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A TREATISE
ON THE
LAW RELATING TO
GIFTS AND ADVANCEMENTS

BY

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PREFACE.

. It is difficult to confine the subject of Gifts within reasonable limits. It is almost as broad as that of Contracts. The leading features of a gift are not so numerous, but the difficulty lies in their application. The complex affairs of modern civilization every day render this more difficult, and call for a modification of the stern rigor of the common law.

So closely are the subjects of Gifts and Advancements connected that the work would be incomplete were treatment of the latter omitted. On this subject the book may be said to be a pioneer.

It has been the author's aim frequently to state cases at length in connection with the principle then under discussion, in order to illustrate it and show how it has been applied, and in this way bring out the conflict in the cases. He believes he has been moderately successful in his undertaking, and trusts that the profession will derive some benefit from an examination of the work.

W. W. THORNTON.

INDIANAPOLIS, June 1, 1893.

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CHAPTER I.

DONATIO INTER VIVOS.

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1. TWO CLASSES—INTER VIVOS AND MORTIS CAUSA.—Gifts are usually divided into two classes: *Inter vivos* and *mortis causa*. A gift *inter vivos* is made to take effect during the life of the donor, either absolute or conditionally; but a gift *mortis causa* is made during the last sickness of the donor, conditioned upon his death. In many particulars they are alike, and differ in but a few. Thus a *donatio mortis causa* must have all the essentials of a gift *inter vivos*; but the law attaches to the former the condition that it must be executed during the donor's last sickness, in contemplation of death, and upon the condition that he die from the then sickness; for if he survives, the gift, *ipso facto*, is revoked.¹

2. DEFINITION OF GIFT INTER VIVOS.—A gift *inter vivos* is a voluntary transfer of property by the owner to another, without any consideration or compensation as an incentive or motive for the transaction.² Popu-

¹ Kilby v. Godwin, 2 Del. Ch. 61; Kiff v. Weaver, 94 N. C. 274.

² Gray v. Barton, 55 N. Y. 68, 72.

larly speaking, the thing given is called a gift. Gifts and advancements are sometimes used interchangeably as indicating the same transaction. Yet, while an advancement is always a gift, a gift is by no means always an advancement.¹ A gift imports a benefit; and usually an acceptance of the bounty may fairly be presumed, until the contrary appears.² "A gift *inter vivos*," said the Supreme Court of Ohio, "has been defined as an immediate, voluntary, and gratuitous transfer of his personal property, by one to another."³ A very fair illustration of a gift is a bounty paid by the United States government to those enlisting in the army;⁴ or a pension.⁵

3. ESSENTIALS OF VALID GIFT.—While it is anticipating the discussion of the subject, it is as well to here state

¹ Dowell's Estate, 3 Brews. 314.

² Kilwick v. Maldman, 1 Burr. 59. "The act of transferring the right and possession of a personal chattel, whereby one man renounces and another acquires all the title and interest therein;" Hynson v. Terry, 1 Ark. 83, 87.

³ Flanders v. Flandy, 45 Ohio St. 168, 113; Minchin v. Merrill, 2 Ed. Ch. 233; Taylor v. Fire Department, 1 Ed. Ch. 294; Conner v. Hull, 36 Miss. 424; Young v. Young, 25 Miss. 38; Roberts v. Draper, 18 Bradw. 167; Payne v. Powell, 5 Bush. 248; Lynch v. Holmudi, 5 Low. Can. Jur. 306; Livingston v. Livingston, 29 Noh. 107, 178; McKensie v. Harrison, 120 N. Y. 260, 265.

⁴ Meurs v. Blackford, 55 Me. 528; Hinsmore v. Welber, 59 Me. 103; Holt v. Holt, 59 Me. 494. The word "bonus" used in 36 Viet., ch. 48, sect. 372, sub. sect. 3, of the Ontario statute, construed to not mean a gift: Scottish Amer. Invest. Co. v. Elton, 3 Ontario App. 228. "Gratuitous gift;" Holmes v. Cartier, 5 Low. C. Rep. 290. Other definitions of a gift *inter vivos*: Walker v. Crews, 78 Ala. 412; Henson v. Kinard, 3 Strub. Eq. 371; McLean v. Longlands, 5 Ves. Jr. 71; Horn v. Garton, 1 Fla. 90; Irish v. Nutting, 47 Barb. 370; Smith v. Dorsey, 38 Ind. 451.

⁵ Sample v. United States, 24 Ct. of Cl. 422. An instrument of writing conveying a title to personal property in which the grantor uses the expressions "give and bequeath," when followed by a delivery of the property, is a donation *inter vivos*: Crawford v. Pickett, 14 La. Ann. 639. The Geneva Award was not a gift in trust for the persons who had suffered loss at the hands of the Southern Confederacy: Taft v. Mansley, 120 N. Y. 474; Leonard v. Nye, 125 Mass. 455. A husband and wife conveyed lands to their son, who agreed to provide for them while they lived, and after their death pay a certain sum to their daughter. As to their daughter this was held to be a settlement and not a gift: Henderson v. McDonald, 84 Ind. 149.

the things essential to make a valid gift. The donor must have the capacity to make a gift;¹ he must have an intention to make it;² his intention must be to make it now, and not in the future;³ he must deliver, either actually or constructively, the thing given to the donee;⁴ releasing all dominion over the thing given and investing the donee with whatever dominion he possessed;⁵ there must be an acceptance by the donee;⁶ it must be irrevocable, unless the consent of both the donor and donee is first obtained;⁷ it must be without a valuable consideration, for if there be a valuable consideration, however small, for the transaction, it is a contract and not a gift;⁸ the thing given must not be indefinite,⁹ and the entire transaction must show a valid gift as a whole and not of a part.¹⁰

4. CONSIDERATION.—A consideration is entirely unnecessary to uphold a gift. In fact, if there be a consideration the transaction is no longer a gift, but a contract. "The question as to the adequacy of the consideration cannot influence the decision of the case, for a consideration is only necessary to support an agreement or *executory* contract."¹¹ Consequently in all cases of donation there can be no such a thing as failure of consideration.¹²

¹ See Section 50.

² See Section 70.

³ See Section 72.

⁴ See Section 131.

⁵ See Section 135.

⁶ See Section 79.

⁷ See Section 105; *Mims v. Ross*, 42 Ga. 121; *Shaw v. White*, 28 Ala. 637.

⁸ See Section 101.

⁹ *Sheedy v. Roach*, 124 Mass. 472.

¹⁰ *McGrath v. Reynolds*, 116 Mass. 566.

¹¹ *Stewart v. Hidden*, 13 Minn. 43.

¹² *Gilmore v. Hayworth*, 26 Texas, 89; *Fulton v. Fulton*, 43 Barb. 581; *Worth v. Case*, 42 N. Y. 362.

Thus, it has been said, "A gift, as implied by its definition, must be without consideration."¹ Although a consideration is named in the deed of gift, it is admissible to show that there was none intended or paid.²

5. CONSIDERATION DISPROPORTIONATE OR NOMINAL.—The disproportion of the consideration to the value of the thing given is immaterial. If there is some consideration which prompted the transaction, it will render that which would have been a gift a contract.³ Thus where an aged and childless man agreed with a father that if he would name the child after him he would provide for it generously; and afterward, on the child being so named, in consideration of the naming of the child, he executed his note to the father in the sum of ten thousand dollars, the note was held valid; for the transaction was a contract and not a mere gift, and the promisor having received all he contracted for, the court declined to examine its sufficiency.⁴ But the recital of a mere nominal consideration will not turn a gift into a contract if, from the context of the instrument, or from the acts or language of the parties, it appears that the pecuniary consideration named was merely formal. In such an instance the transaction remains a gift.⁵

6. LOVE AND AFFECTION A SUFFICIENT CONSIDERATION TO SUPPORT A CONVEYANCE OF REAL ESTATE.—

¹ *Jackson v. Twenty-third St. R. W. Co.*, 15 J. & S. (N. Y.) 85. "A bond without any consideration is obligatory, and there is no relief in equity against such a bond; for it is voluntary, and as a gift, and no consideration is pretended. If a drunken man gives his bond, it binds him. A gift of anything without a consideration, is good; but it is revocable before delivery to the donee of the thing given." Chap. IX, Jenkins, 108, 109.

² *Woods v. Whitney*, 42 Cal. 358; *Salmon v. Wilson*, 41 Cal. 595; *Barker v. Koneman*, 13 Cal. 9; *Peck v. Vandenberg*, 30 Cal. 11.

³ *Worth v. Case*, 42 N. Y. 362.

⁴ *Wolford v. Powers*, 85 Ind. 294.

⁵ *Morris v. Ward*, 36 N. Y. 587; *Hatch v. Straight*, 3 Conn. 31.

It has long been a settled rule with the courts that love and affection raises a sufficient consideration to support a conveyance of real estate, especially if the donor and donee are blood relatives ; and the insertion of a nominal sum for the consideration, although paid, will not change the transaction from a gift to a sale.¹ It may always be shown that the recitation of a consideration in a deed is false, and that the land conveyed was a gift in fact.² "It is an elementary principle," said the Supreme Court of Iowa, "that the consideration of blood, or natural love, is a good consideration, and that an executed contract or conveyance made upon such consideration is binding between the parties and all others, except subsequent purchasers without notice, and creditors."³ Yet if it clearly appears that the amount paid, however small, was an actual consideration, and so regarded by the grantor and grantee, then the deed is one of contract and not of gift, and the courts will so regard it.⁴ But love and affection, or blood relationship, is no longer regarded as necessary to support a voluntary gift of real estate. A voluntary conveyance between a donor and donee not related, and who are in fact violent personal enemies, if intended as a gift, is valid. It is a gift, and by insisting that there must be love and affection, or relationship, or a consideration, the entire transaction is turned into a contract ; and it is tacitly thereby admitted that a gift, pure and simple,

¹ *Morris v. Ward*, 36 N. Y. 587 ; *Banks v. Merksberry*, 3 Litt. 275.

² *Pate v. Johnson*, 15 Ark. 275, overruling *Gullett v. Lamberton*, 1 Eng (Ark.) 109.

³ *Mercer v. Mercer*, 29 Iowa, 557 ; citing *Noble v. Smith*, 2 Johns. 32 ; *Grangiac v. Arden*, 10 Johns. 293 ; *Pitts v. Mangum*, 2 Bailey L. 588 ; *Pearson v. Pearson*, 7 Johns. 26 ; *Carpenter v. Dodge*, 20 Vt. 595 ; *Moore v. Pierson*, 6 Iowa, 279. Affirmed in *Burgess v. Pollock*, 53 Iowa, 273 ; *Thornton v. Mulquinne*, 12 Iowa, 549 ; *Pierson v. Armstrong*, 1 Iowa, 282.

⁴ *Fairley v. Fairley*, 34 Miss. 18 ; *Fairly v. Fairly*, 38 Miss. 280 ; *Morris v. Ward*, 36 N. Y. 587.

of real estate cannot be made. At this period of enlightened jurisprudence no court, or at least very few, desire to assume this position.¹

7. GIFT OR SALE.—It is sometimes very difficult to tell whether the transaction was a gift or a sale. In all such instances the entire transaction must be examined; and if the evidence shows that an act of sale was intended as an act of donation, and it is clothed with all the formalities required by law for the validity of a gift, effect will be given to it as a gift, or *vice versa*, as the case may be.² A sale without a price is a donation of the thing sold.³ But where bonds were delivered by one person to another under an express promise, made in writing, by the latter, to return them “whenever called for,” the promise was considered a written contract, the terms and conditions of which could not lawfully be varied or modified by parol proof, and such an undertaking entirely incompatible with the idea of an absolute gift.⁴ Yet a payment of money by a father, as a surety for his son was held to be a gift.⁵ A father in advanced years, and in anticipation of death, conveyed his farm to one of his sons, to be paid for in a conveyance of a part to another son, a brother of the grantee, and a part by note and mortgage, and the remainder of the price was to be a gift. The transaction was held a sale, the conveyance not a gift, although there was a gift of a part of the purchase-money.⁶ It is quite

¹ Tiedman on Real. Prop., sect. 801. “Therefore a want or failure of consideration is no good avoidance of a deed.” 3 Wash. Real Prop. (5th ed.) 391.

² *Harper v. Pierce*, 15 La. Ann. 666; *Haggerty v. Corri*, 5 La. Ann. 433; *Rhodes v. Rhodes*, 10 La. 85; *In re Corse*, 2 Fed. Rep. 307; *Randall v. Peckham*, 11 R. I. 600; *Hughey v. Eichelberger*, 11 S. C. 36; *M'Cord v. M'Cord*, 11 Rev. Leg. 510; S. C. 5 Leg. News, 342.

³ *D'Orgenoy v. Droz*, 13 La. 382.

⁴ *Selleck v. Selleck*, 107 Ill. 389.

⁵ *Browns v. Brown*, 4 B. Mon. 535.

⁶ *Spear v. Griffith*, 86 Ill. 552.

material on an indictment for illegally selling intoxicating liquor that a sale be proved; for proof of a gift will not support it; and so if a gift is charged, a sale cannot be shown.¹ So proof of a barter or gift will not support the charge of a sale.²

8. GIFT OR LOAN.—Like in the case of a gift or contract, so in the case of a gift or loan, all the circumstances of the transaction must be considered to determine the respective rights of the parties; and if what was at first a loan is changed to a gift, the burden lies upon the alleged donee to show that the change was made.³ Thus in South Carolina, during the time of slavery, if a father on his son's marriage delivered to him a slave, or permitted the slave to go home with him, or sent the slave to him, it was *prima facie* evidence of a gift; but it was always permissible to rebut the presumption by proof of the circumstances under which the parent gave possession to the son; such a circumstance was the repossession by the parent, and retention of the slave.⁴ The relation of the parties justified the presumption of a gift.⁵ Whether or not the transaction amounts to a gift or loan is a question for the jury; and the court cannot say to it that the law presumes it was intended as a gift unless there was an avowal of a contrary intention at the time of the

¹ *Brannan v. Adams*, 76 Ill. 331; *Birr v. People*, 113 Ill. 645; *State v. Decker*, 10 W. L., Jr. 323; *Schaffner v. State*, 8 Ohio St. 642; *Kober v. State*, 10 Ohio St. 444; *Ralph v. Link*, 5 Q. B. (Can.) 145.

² *Stevenson v. State*, 65 Ind. 409; *Massey v. State*, 74 Ind. 368. A father told a minor son that if he would take one of his mares to a horse and pay for the service the foal should be his own, and the son did so; it was held that the transaction was a contract: *Linnendoll v. Doe*, 14 Johns. 222.

³ *Selleck v. Selleck*, 107 Ill. 389. See *Steedman v. McNeill*, 1 Hill L. (S. C.) 194; *Booth v. Terrell*, 18 Ga. 20.

⁴ *Watson v. Kennedy*, 61 Strobh. Eq. 1; *Davis v. Duncan*, 1 McCord (S. C.), 212; *Johnson v. Ghost*, 11 Nebr. 414; *Whitfield v. Whitfield*, 40 Miss. 352; *Crawford v. Manson*, 82 Ga. 118; *Keene v. Macey*, 4 Bibb. 35.

⁵ *Smith v. Montgomery*, 5 T. B. Mon. 503.

delivery. The relationship may justify the jury or court in presuming an intended gift in such an instance, but that presumption may be repelled by other circumstances.¹ A father told his son "he would let him have one of three negro boys, he might take choice," and then, after the selection had been made, he "remarked that he would let him have the boy he had selected as a loan to be redelivered when called for." The court decided that the transaction was clearly a loan and not a gift.² In an action for money loaned, the defendant and one M. testified that they applied to the plaintiff for loans of money to purchase certain stock; that the plaintiff assented, and gave M. a check for the money with which to purchase the stock, including one hundred shares for himself; that M. purchased the stock, and that, a day or two thereafter, the defendant, M. and the plaintiff being together, and M. having the certificate of shares in his possession, the defendant and he proposed to give their note for the money advanced to them, and that the plaintiff declined to receive the notes, and told them that he made them a present of the stock; and that M. thereupon handed to the defendant one hundred shares, gave the plaintiff his one hundred, and took fifty shares himself. The court instructed the jury that the mere application of M. and the defendant to the plaintiff to make the loan, and the consent of the plaintiff to such application, did not necessarily constitute a loan from the plaintiff to the defendant, or from the plaintiff to M., if the plaintiff all the time intended the transaction to be a gift and not a loan. There was a verdict for the defendants; and the court upheld the verdict.³ D., before he married the plaintiff,

¹ *Keene v. Macey*, 4 Bibb. 35; *Crawford v. Manson*, 82 Ga. 118; *Ide v. Pierce*, 134 Mass. 260; *Falconer v. Holland*, 5 S. & M. 689; *Hick v. Keats*, 4 B. & C. 69.

² *Smith v. Jones*, 8 Ark. 109.

³ *Helm v. Martin*, 59 Cal. 57.

his second wife, donated and gave to a school association, to aid in establishing it, a certain sum of money ; and after D.'s death and the final settlement of his estate, the trustees of the school association sold its property and out of the proceeds paid the amount he had given them to the defendant, as the only child and heir of D. by a former marriage. D. had no children by his second wife, and the claim was made by this second wife that this money was part of the assets of the estate ; but the court held that it was not, that the gift by D. to the school was an absolute gift, and the payment of the money by the association to his son was entirely voluntary, and consequently the amount so paid formed no part of the assets of the estate.¹ So where A placed his son-in-law in possession of a slave, at the same time declaring it to be a loan ; and the slave remained in the possession of B for more than five years, it was held that it did not amount to a gift, and that the statute of limitations did not apply to the transaction.² So where a husband received from his wife certain bonds, it was held that whether or not the transaction was a gift was a question of fact for the trial court, and its decision was not reviewable on appeal.³

9. GIFT OR LOAN—MISUNDERSTANDING.—Suppose, however, that A give money to B as a gift, but B takes it as a loan, does B become A's debtor for the amount, or is the ownership of the money transferred to B? We quote the language of a distinguished English judge on this

¹Day v. Day, 100 Ind. 460.

²Moseby v. Williams, 5 How. (Miss.) 520.

³Haskell v. Hervey, 74 Me. 192. The term "lend" when used in a will is generally equivalent to "give:" Booth v. Terrell, 16 Ga. 20 ; Hinson v. Pickett, 1 Hill Ch. (S. C.) 35 ; Bryan v. Duncan, 11 Ga. 67.

A loan of money sent by a brother to a sister, in accordance with her request, is not changed from a loan to a gift by permission to retain it as long as she might want it. At the furthest it would be due at her death : Rivina's Ap., 37 Leg. Int. 466.

point: "But then, in my opinion," said he, "in order to make out a gift, it must not only be shown that the cheque was sent as a gift, but that it was received as a gift. It requires the assent of both minds to make a gift as it does to make a contract. No doubt you may infer that a person has assented to that which is obviously for his benefit on slighter evidence than would be required to show he assented to a contract which may be to his prejudice; but still it is by no means uncommon, particularly in the case of money transactions between relations, that the party intended to be benefited may prefer to receive as a loan what has been offered as a gift. Surely it is not an extraordinary thing that a man should offer to make a present to his friend and that the friend should say, in answer, 'I am much obliged to you for the money, and it is of the greatest possible use to me; but I cannot take it as a gift, I can only take it as a loan.' If the person who had advanced the money acquiesced in this, the ultimate agreement would be for a loan, and the transaction would be one of loan, and not of gift, although I quite agree that the person who sent the money might in his turn, say: 'I do not choose to have it taken as a loan; you must take it as a gift or not at all.' In that case, if the person to whom the money was sent did not return it, but kept it, of course it would be a gift."¹ But this does not exactly answer the question. A may have intended a gift, and B thought it was a loan. In that event both are in error; but it seems to be conceded that the ownership of the property passes to B.² So it has been said that "if A sends a case of wine to B, intending to sell it, but fails to communicate his intention, and B honestly

¹ *Hill v. Wilson*, L. R. 8 Ch. App. 888; S. C. 42 L. J. Ch. 817; 29 L. J. 238; 21 W. R. 757.

² *Wald's Pollock on Contracts*, 419 (2d. Am. ed.).

believing it to be a gift, consumes it, there is no ground for holding B to be responsible for the price either in law or equity, if he be blameless for the mistake.”¹

10. AN ADVANCEMENT NOT A GIFT.—An advancement cannot be taken as a gift; nor can it be insisted that an actual gift is an advancement. Thus in England if a father gives his son a sum of money to pay the latter's debts, it is an “advancement by portion,” within the meaning of the statute on the subject of advancements. “Whenever a sum is paid for a particular purpose,” said Vice Chancellor Wood, “which is thought good and right by the father, and which the son himself desires, if it be money which is drawn out in considerable amount, and not a small sum, it must be treated as an advance. The payment of the money is the important thing—the court does not look to the application. As to the debts, suppose the young man had represented to his father that it was extremely important they should be paid, in order that he might keep his position in the army, and the father had paid those sums in order to assist him, it would have been clearly an advance.”²

11. GIFT INDEFINITE.—It is one of the essentials of a valid gift that the thing given shall be definitely designated; for if the thing given cannot be accurately ascertained, the gift will fail.³

¹ Benjamin on Sales, p. 373; *Regina v. Middleton*, 2 L. R. C. C. 38, 56; S. C. 42 L. J. M. C. 73; 28 L. T. 777; 12 Cox, C. C. 260, 417.

² *Boyd v. Boyd*, L. R. 4 Eq. 305; *Edwards v. Freeman*, 2 P. Wms. 435; *Blockley v. Blockley*, L. R. 29 Ch. 250; S. C. 54 L. J. Ch. Div. 722; 33 W. R. 777, disapproving of opinion of Jessel, M. R., in *Taylor v. Taylor*, L. R. 20 Eq. 155. See *Milnes v. Sherwin*, 33 W. R. 927; *Turner v. Turner*, 53 L. T. 379; *Evans v. Maxwell*, 50 L. T. 51; *Holliday v. Wingfield*, 59 Geo. 206; *Wallace v. Owen*, 71 Ga. 544; *Bay v. Cook*, 31 Ill. 336.

³ *Sheedy v. Roach*, 124 Mass. 472; *Holeman v. Hart*, 3 Strobb. Eq. 66.

12. GOOD ONLY IN PART.—If a gift is only good in part, the whole gift must fail, if the intention of the donor is only to make the gift as a whole.¹ But if there be several articles intended to be given, part of which are not effectually given, yet the gift will be valid as to those given, unless it appears that the donor would never have given such part without the part fairly had also been given.

13. LEX LOCI.—The *lex loci* always governs the validity of a gift; thus it was held that a gift of slaves made in Maryland between parties there residing, was to be controlled by the law of that State when the gift was drawn in question in Kentucky.² So if a gift is completed in one State by a resident of another State, its validity will be tested by the law of the State where it was completed—the place of delivery.³ So where a gift was completed in Tennessee, between parties temporarily there, on their return to Texas, the gift was adjudged according to the law of the former State.⁴ The validity of a gift must be determined by the law of the place where it was made, without reference to the domicile of the donor.⁵

¹ McGrath v. Reynolds, 116 Mass. 566.

² See Section 215; Tarlton v. Briscoe, 4 Bibb. 73; Adams v. Hayes, 2 Ired. L. 361; Davis v. Boyd, 6 Jones L. 249; Edrington v. Mayfield, 5 Tex. 363; Gamble v. Dabney, 20 Tex. 69.

³ Weatherby v. Covington, 3 Strobb. L. 27; Tillman v. Moseley, 14 La. Ann. 710; Claiborne v. Tanner, 18 Tex. 68; O'Brien v. Hilburn, 22 Tex. 616; Faulk v. Faulk, 23 Tex. 653; Maiben v. Bobe, 6 Fla. 381; McCraw v. Edwards, 6 Ired. Eq. 202; Burt v. Kimbell, 5 Port. (Ala.) 137; McCullough v. Walker, 20 Ala. 389.

⁴ Parks v. Willard, 1 Tex. 350; Henderson v. Adams, 35 Ala. 723; Howard v. Copley, 10 La. Ann. 504; Hollomon v. Hollomon, 12 La. Ann. 607; Crawford v. Puckett, 14 La. Ann. 639; McCraw v. Edwards, 6 Ired. Eq. 202.

⁵ Emery v. Clough, 63 N. H. 552.

CHAPTER II.

DONATIO MORTIS CAUSA.

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| 14. The Earliest English Case. | 34. Length of Time Intervening Between Gift and Death. |
| 15. How Such Gifts Are Regarded by the Courts. | 35. Gift by Deed or in Writing. |
| 16. Bracton's Definition and Classes. | 36. Donatio Mortis Causa in Trust. |
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| 27. The Threatened Danger to His Life the Criterion—Belief of Donor. | 47. Administrator or Executor Has no Control Over Property Given—Proof in Probate Court. |
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| 31. Suicide. | |
| 32. Gift by Reason of Old Age. | |
| 33. A Soldier's Gift. | |

14. THE EARLIEST ENGLISH CASE.—The earliest English case on the subject of *donatio mortis causa*, is *Jones v. Selby*,¹ decided in 1710. Critically examined, however, the case does not seem to have been a case of *donatio mortis causa*, but the court in which it was pending and all courts since then so regard it. That was a case where the alleged donor by will gave the donee £500, and several months afterward gave her a trunk, and called

¹ Finch's Precedents, 300; S. C. 2 Eq. Abr. 573, case 2; Gibb. Ch. 342.

his two servants as witnesses to the gift of the trunk. At the time of the gift he does not seem to have been sick, nor in peril of death ; for he several times afterward called his servants' attention to the fact of the gift, asked them if they remembered it, and once took a candle and went and showed them where the trunk was placed. Three years after this he made a second will, and gave the donee £1,000, but took no notice therein of the gift of the trunk, or anything in it. At his death the donee opened the trunk and found in it articles of considerable value, and a government "tally" for £500. The court held that there was not sufficient evidence to prove that the tally was in the trunk at the time of the gift, and also that the £1,000 given by the second will was a satisfaction of the £500 given by the first will and the £500 tally. This is all there is in the case, and all loose language used with reference to a *donatio mortis causa* has no necessary connection with the case, although the court seems to have regarded the transaction as a gift *causa mortis*. Speaking of this case, the Supreme Court of Connecticut said, "That the commencement of the case upon this head seems to have been the effect of that part of the English statute of frauds, which relates to nuncupative wills, and a struggle to support, in courts of equity, claims, which but for that statute, would have been brought forward in spiritual courts. The law in relation to those donations, has, however, been introduced into, and made a part of the common law ; and so far as it has been recognized, is to be enforced."¹ The second case on this subject was *Drury v. Smith*² (1717), and the third *Lawson v. Lawson* (1718) ;³ where a gift of a purse of

¹ *Raymond v. Sellick*, 10 Conn. 480, 485.

² 1 P. Wm. 404 ; S. C. 2 Eq. Cas. Abr. 575, pl. 3.

³ 1 P. Wm. 441 ; S. C. 2 Eq. Cas. Abr. 575, pl. 4.

one hundred guineas by a husband to his wife, was held to be a good *causa mortis*.¹ This is the first case of a genuine *donatio mortis causa* reported.² The third case is *Miller v. Miller*³ (1735), gift of two notes payable to bearer. The fourth is *Snellgrave v. Bailey*⁴ (1744), in which it was held that a gift of a bond, as a *donatio mortis causa*, was valid. Finally the law was settled in *Ward v. Turner*,⁵ and in *Tate v. Hilbert*.⁶ In *Ward v. Turner* Lord Hardwicke clearly showed that these kind of gifts had their origin in the civil law, citing numerous authorities to prove his assertions; and in *Tate v. Hilbert*, Lord Loughborough happily supplements this decision of Lord Hardwicke.⁷

15. HOW SUCH GIFTS ARE REGARDED BY THE COURTS.

—The early cases manifest a decided hostility to these kind of gifts. Thus, in the earliest case the chancellor said: “That these sort of donations, especially where they were of the same kind with what was given by the will, ought to be fully proved in all circumstances; otherwise they were not to be countenanced, because it would open a way to perjury and fraud greater than the statutes already in force had provided against,” and

¹ A gift of an order or bill drawn on his goldsmith was also held, in this case, a good gift.

² In *Drury v. Smith*, the case of *Smith v. Casen*, an unreported case of the date of December 8, 1718, is referred to.

³ 3 P. Wms. 356.

⁴ 3 Atk. 214.

⁵ 2 Ves. Sr. 431.

⁶ 2 Ves. Jr. 111; S. C. 4 Bro. C. C. 286 (1793).

⁷ The case of *Hedges v. Hedges*, Finch's Ch. 269; S. C. Gibb. Eq. 12, 13; 2 Eq. Cas. Abr. 263; 2 Vernon, 615; 7 Vin. Abr. 138, 215, cannot be regarded as a case of *donatio mortis causa*. In *Ward v. Turner*, *supra*, Lord Hardwicke refers to *Ousley v. Carrol*, an unreported case, of June, 1722, decided in the Prerogative Court, but it only incidentally touched the question, and the same is true of *Shar-gold v. Shargold*, there cited by him (a deed of gift by the poet Pope). For custom of London, see *Tomkyns v. Ladbroke*, 2 Ves. Sr. 591.

“that he set there to condemn frauds, and therefore might presume them, unless they proved the contrary.”¹ Somewhat in the same line the Supreme Court of Connecticut, after citing this case, expressed itself by saying: “But gifts in any form are justly not in favor with the law, being necessarily vague, and so much open to fraud; and, therefore, new principles are not to be adopted to sustain them.”² But these are expressions taken from the older cases; and they are in harmony with few of the modern cases. Speaking of the right to make such gifts, it was said that it was “exceptional, and although we cannot say that courts bear against gifts *causa mortis*, yet the evidence to establish them should be clear and unequivocal, and will be closely scrutinized.”³ The Supreme Court of Michigan, in speaking of this kind of a gift, said: “It was urged strongly on the argument, that the law treats such transactions with disfavor, and that they are contrary to public policy, and not to be sustained where it can be avoided. There is no doubt some such language in the books. But it is only used in the sense that such acts are scrutinized carefully to ascertain whether freely and intelligently done. There is no middle class between lawful and unlawful acts. And it is the duty of courts to enforce all lawful rights, so as to carry out the intention of the parties. That intention should always be observed if lawfully expressed,⁴ and it is only incumbent on legal tribunals to be very careful to ascertain the facts. There is much room for frauds and mistakes in cases of this kind, and therefore care should be used to sift the evi-

¹ Jones v. Selby, *supra*.

² Raymond v. Sellick, 10 Conn. 480, 485; Parcher v. Saco, etc., Savings Inst., 78 Me. 470; Champney v. Blanchard, 39 N. Y. 111; Bedell v. Carll, 33 N. Y. 581; Hebb v. Hebb, 5 Gill (Md.), 506.

³ Trenholm v. Morgan, 23 S. C. 268, 278.

⁴ See Section 72.

dence. But where there is no doubt about the facts, it would be a legal wrong and gross injustice to refuse to act upon them fairly and without hesitation.”¹

16. BRACTON'S DEFINITION AND CLASSES.—Bracton, one of the earliest writers on the English law, has described a *donatio mortis causa* at considerable length. “There are amongst other donations,” says he, “a donation in view of death, one when a person is not crushed by any fear of a present danger of death, but gives solely from the contemplation of mortality; another when a person, moved by the imminent danger of death, gives in such terms that the thing forthwith becomes [the property] of the acceptor. A third, as [for instance] if a person moved by danger does not give in such terms, that the things forthwith becomes the acceptors, but only then, when death has followed. And a donation in view of death may be manifold, as [for instance] if a person in contemplation or suspicion of death, gives to a certain person, which kind of donations are frequently made by sick persons, or by those who are going into battle, or are about to sail by sea,² or one about to travel abroad, and have in themselves a tacit condition, that such kinds of donations may be revoked, if the sick man recovers,³ if the soldier returns safe from action, if the sailor returns from his voyage and the traveler from his journey. And donations which are thus made from suspicion of death, are confirmed by the death of the debtor, and they are made [on this understanding], that if any thing happens

¹ *Ellis v. Secor*, 31 Mich. 185, 188; S. C. 18 Am. R. 178; *Dresser v. Dresser*, 46 Me. 48; *Kurtz v. Smither*, 1 Dem. N. Y. 399.

² It is curious to note how perilous a sea voyage was regarded in Bracton's time; for here it is almost classed with the fatality of death; and so we may note with regard to traveling “abroad.”

³ It is hardly necessary to say that at the present day this is the only kind of *donatio mortis causa*.

humanly to the testator, he, to whom the legacy is made, shall have the legacy, but if the testator recovers, he shall retain or regain the legacy,¹ or if he to whom the legacy is given, dies first. And if two persons, who have made mutual donations to each other in view of death, die at the same time, the heir of neither shall claim, because neither has survived the other. And such a donation is in reality [a donation] in view of death, when a testator wishes himself to possess the legacy, rather than the legatee, and the legatee [to possess it] rather than his heir. But if it were so given in view of death, that it could not in any case be revoked, the object in giving is more than a giving in view of death, and ought to be accounted of the same effect as any other donation between the living, and therefore as between husband and wife it is not valid.² It is allowable to make a donation in view of death, not only on account of infirm health, but on account of danger, and approaching death from an enemy or from robbers, or on account of the cruelty or hatred of a powerful man, or on account of an imminent voyage by sea or journey by land, or if a person is likely to pass through a place beset with snares, for all things show urgent danger.”³

17. JUSTINIAN'S DEFINITION.—The definition of Justinian is one often cited in the earlier cases, and it is as well to give it here. “A donation *mortis causa*,” says he, “is that which is made to meet the case of death, as when anything is given upon condition that, if any fatal accident befalls the donor, the person to whom it is given

¹ It is hardly necessary to state that a will is not here referred to nor under consideration.

² We have so far left the barbarian behind us that a husband may now make a valid gift to his wife.

³ Bracton I, chap. 26, p. 475. (Sir Travers Twiss' edition and translation.)

shall have it as his own ; but if the donor should survive, or if he should repent of having made the gift, or if the person to whom it has been given should die before the donor, then the donor shall receive back the thing given. These donations *mortis causa* are now placed, in all respects, on the footings of legacies. It was much doubted by the jurists whether they ought to be considered as a gift or as a legacy, partaking as they did in some respects of the nature of both ; and some were of opinion that they belonged to the one head, and others that they belonged to the other. We have decided by a constitution that they shall be in almost every respect reckoned amongst legacies, and shall be made in accordance with the forms our constitution provides. In short, it is a donation *mortis causa*, when the donor wishes that the thing given should belong to himself rather than to the person to whom he gives it, and to that person rather than to his own heir.”¹

18. SWINBURNE'S DEFINITION.—A definition frequently cited by the old cases is that of Swinburne, who wrote his work on Wills shortly before 1590. “A gift in consideration of death is,” says he, (1) “Where a man moved with

¹ Sandar's Institutes of Justinian, p. 147. Justinian cites Telemachus' gift to Piræus, which is as follows (we use Bryant's translation of the *Odyssey*): “And then discreet Telemachus replied: ‘We know not yet, Piræus, what may be the event; and if the suitors privily should slay me in the palace, and divide the inheritance among them, I prefer that thou, instead of them, shouldst have the gifts; but should they meet the fate which I have planned, and be cut off, then shalt thou gladly bring the treasures, which I gladly will receive.’” Book XVII, l. 93-100. See Staniland v. Willott, 3 MacN. & G. 664, and Dexheimer v. Gautier, 34 How. Pr. 472. “The phrase *dono dare* was appropriated in Roman law to the mode of transferring property by gift; *dare* signifying that the whole property in the thing was passed by delivery, and *dono* expressing the motive from which the delivery was made:” Hammond's Justinian, p. 147. See quotation from the Digest in Hambrooke v. Simmons, 4 Russ. Ch. 25. See, also, Ward v. Turner, 2 Ves. Sr. 431; and Tate v. Gilbert, 2 Ves. Jr. 111; S. C. Bro. Ch. 286. In Holt N. P. 357 the civil law distinction between the two kinds of gift is succinctly pointed out.

the consideration of his mortality, doth give and deliver something to another, to be his, in case the giver die ; otherwise if he live, he to have it again. Of (2) gifts in case of death there be three sorts : One, where the giver, not terrified with fear of any present peril, but moved with a general consideration of man's mortality, giveth anything. Another, when the giver being moved with imminent danger, doth so give that straightways it is made his to whom it is given. The third is, when any being in peril of death, doth give something, but not so that it shall presently be his that received it, but in case the giver do die. This (3) last kind of gift is that which is compared to a legacy. But the other two are reputed simple gifts, if the giver do not make express mention of his death ; and so they cannot be revoked, but take full effect from the time of making of the gift, if the same be not fraudulent.”¹

19. DEFINITIONS.—But these definitions of *donatio mortis causa*, taken from the civil law, have not been accepted in their full length and breadth, “They are undoubtedly taken from the civil law,” said Lord Hardwicke, “but not to be allowed of here further than the civil law on that head has been received and allowed ;” and the chancellor then proceeds at considerable length, in what is regarded as the leading English case.² “A *donatio mortis causa*,” says a writer on wills,³ “or, as it has

¹ Swinburne on Wills, 22. Upon this classification Mr. Roper says, “It appears that the third alone is the proper donation *mortis causa*, the other two being nothing more than pure gifts *inter vivos*. This is also apparent from the definition of a donation *mortis causa* given by Justinian after the contest which prevailed upon the subject had subsided :” Roper on Legacies, p. 2. See *Bunn v. Markham*, Holt, N. P. 352, note ; *Tate v. Gilbert*, 2 Ves. Jr. 111 ; S. C. 4 Bro. Ch. 286 ; *Ward v. Turner*, 2 Ves. Sr. 431.

² *Ward v. Turner*, 2 Ves. Sr. 431. See, also, *Tate v. Gilbert*, 2 Ves. Jr. 111 ; S. C. 4 Bro. Ch. 286.

³ Flood on Wills, 2.

been styled, an improper kind of legacy, may be generally defined, or rather perhaps described, as a duly witnessed¹ gift, either direct or in trust,² of something, the property in which can, and does actually, pass by mere delivery,³ made by a person in his last illness, or apprehensive of approaching death,⁴ but to take effect only on that event happening⁵ at or about the time anticipated, or within a reasonable time afterward,⁶ and provided there be no revocation of the gift by the donor's recovery and his subsequent resumption thereof."⁷ "To constitute a *donatio mortis causa*," said the Supreme Court of New Hampshire, "there must be three attributes: (1) the gift must be with a view of the donor's death; (2) it must be subject to the condition that it shall take effect only on the donor's death by his existing illness, and (3) there must be a delivery of the subject of the donation."⁸

¹ Citing *Tate v. Hilbert*, 2 Ves. Sr. 111; *Walters v. Hodge*, 2 Swanst. 97; *Thompson v. Heffernan*, 4 D. & War. (Ir.) 285; *Cosnahan v. Grice*, 15 Moo. P. C. 215; *Hayslep v. Gymer*, 1 A. & E. 162; S. C. 3 N. & M. 479.

² Citing *Blount v. Burrow*, 4 Brown, C. C. 72; *Hills v. Hills*, 8 M. & W. 401; S. C. 5 Jur. 1185.

³ Citing *Miller v. Miller*, 3 P. Wms. 356; *Ward v. Turner*, 2 Ves. Sr. 441; *Bunn v. Markham*, 7 Taunt. 224; *Trimmer v. Danby*, 23 L. J. Ch. 979.

⁴ Citing Just. Inst. 2, 7, 1; 2 Black Com. 514; *Gardner v. Parker*, 3 Madd. 102; *Duffield v. Elwes*, 1 Bligh N. S. 497, 530.

⁵ Citing *Tate v. Hilbert*, 2 Ves. Jr. 111; S. C. 4 Bro. C. C. 286; *Edwards v. Jones*, 1 Myl. & Cr. 226; S. C. 5 L. J. Ch. 194; *Staniland v. Willott*, 3 Mac. & Gor. 664.

⁶ Citing *Veal v. Veal*, 27 Beav. 303; S. C. 29 L. J. Ch. 321, where three months elapsed between the date of the gift and death.

⁷ Citing *Ward v. Turner*, *supra*; *Bunn v. Markham*, 7 Taunt. 224. See *Brown v. Brown*, 18 Conn. 410, 415.

⁸ *Keniston v. Sceva*, 54 N. H. 24 37. See *Prince v. Hazleton*, 20 Johns. 502, 514; *Bedell v. Carll*, 33 N. Y. 581; *Wells v. Tucker*, 3 Binn. (Pa.) 366, 370; *French v. Raymond*, 39 Vt. 623; *Miller v. Jeffress*, 4 Gratt. 472; *Dexheimer v. Gautier*, 34 How. Pr. 472.

The following cases contain definitions of gifts *mortis causa*, more or less accurate according to the phase of the subject pending before the court at the time: *Henschel v. Maunerer*, 69 Wis. 576. A gift *causa mortis* is that of a "chattel made by a person in his last illness, or in *periculo mortis*, subject to the implied condition

20. RESEMBLANCE TO A LEGACY.—A *donatio causa mortis* is frequently compared to a legacy; and in some respects they are similar. A legacy usually can only be given by a written will, duly signed by the donor, and attested in accordance with the statute of wills; until the testator has died, the title, and usually the possession, remain in him. But in a gift *causa mortis* a written instrument is not necessary, it may be and usually is made by parol, and the possession of the thing given must be absolutely delivered to the donee before the death of the donor and of the donee. A legacy is always given in view of the possible death of the donor and so must a gift *causa mortis* be given; but in the former instance the donor need, and usually is, not sick nor in present peril of death, while in the case of the latter it must be given in anticipation of a speedy death from a present sickness or impending peril. But the nearest resemblance is the ambulatory character of both of them; for a legacy does not become vested in the donee until the donor die, and it may be revoked at any time before his death, and in this latter particular it corresponds with a gift *causa mortis*. The most characteristic mark of distinction between a legacy and such a gift is the change of possession. "From the nature of the *donatio*, it is apparent that the

that if the donor recover, or if the donee die first, the gift shall be void:" *Michener v. Dale*, 23 Pa. St. 59; *Taylor v. Henry*, 48 Md. 550; *Conser v. Snowden*, 54 Md. 175; *Hebb v. Hebb*, 5 Gill (Md.), 596; *Willemin v. Dunn*, 93 Ill. 511; *Ridden v. Thrall*, 125 N. Y. 572; *Kiff v. Weaver*, 94 N. C. 274; *Cross v. Cross*, L. R. 1 Ch. (Ir.) Div. 389; *Drew v. Hagerty*, 81 Me. 231; *Dresser v. Dresser*, 46 Me. 48; *Earle v. Botsford*, 23 N. B. 407; *Smith v. Dorsey*, 38 Ind. 451; *Irish v. Nutting*, 47 Barb. 370; *Vandor v. Roach*, 73 Cal. 614; *Kilby v. Godwin*, 2 Del. Ch. 61; *Roberts v. Draper*, 18 Bradw. 167; *Trenholm v. Morgan*, 28 S. C. 263; *Dickeschied v. Exchange Bank*, 28 W. Va. 340; *Snell's Eq.* 158; 1 *Watson Eq. Comp.* 136; *Williard's Eq. Jur.* 554; *Toller Ex.* 233; *Pom. Eq. Jur.* § 1146. A conveyance accompanied by an agreement that the grantee will support the grantor for his life takes effect at once, and is not a *donatio causa mortis*: *Willemin v. Dunn*, 93 Ill. 511.

infallible test which must distinguish it from a testamentary gift, is delivery, a change of dominion in *presenti*. Without this there is really nothing to distinguish it from an ordinary testamentary bequest.”¹ In the case of a legacy, the legatee recovers or receives it from the executor or administrator of the donor; but in the case of a *donatio mortis causa*, neither the executor nor administrator has anything to do with it. “A *donatio mortis causa* is claimed *against* the executor, wherever a legacy is claimed *from* him.”² Both are taken subject to the donor’s debt.³

21. DIFFERENCE BETWEEN A GIFT INTER VIVOS AND MORTIS CAUSA.—In all respects gifts *inter vivos* and *mortis causa* are alike with these important exceptions: That a gift *mortis causa* must be made, as has been said, by a person in his last illness, on apprehension of approaching death, conditioned to take effect only on this event happening at or about the time anticipated, or within a reasonable time afterward, with the proviso that there be no revocation of the gift by the donor’s recovery, or by his actual resumption thereof. These exceptions are peculiar to gifts *mortis causa* and form no part of gifts *inter vivos*. The resemblance between them is: That the donor must have the capacity of mind to make such a gift, the donee capacity to receive or accept it; that there shall be no undue influence exercised by the donee over the donor; that something must be given; and that there must be an actual or construct-

¹ *Trenholm v. Morgan*, 28 S. C. 268, 278; *Edwards v. Jones*, 1 Mylne & Craig, 226; *Bryson v. Browrigg*, 9 Ves. Jr. 1; *Drew v. Hagerty*, 81 Me. 231; *Jones v. Brown*, 34 N. H. 439; *Gano v. Fisk*, 43 Ohio St. 462; *Ashton v. Clerk*, Sel. Ch. Cas. 14; *Emery v. Clough*, 63 N. H. 552; *Harris v. Clerk*, 2 Barb. 94; affirmed, 3 N. Y. 93.

² *Flood on Wills*, 21; *Emery v. Clough*, 63 N. H. 552.

³ *Bloomer v. Bloomer*, 2 Bradf. 339.

ive delivery of the article of gift by the donor to the donee in their joint lives. It should be borne in mind that a donor on his death-bed, fully aware of the near approach of his dissolution, may make an absolute gift or a gift *inter vivos*, the fact of his near death not vitiating it.¹

22. DONATIO MORTIS CAUSA NOT AFFECTED BY THE WILLS' ACT.—The English act of Parliament concerning wills did not abolish the right of a dying man to make a *donatio mortis causa*, nor in any way affect such rights;² nor does the act of Parliament, imposing a duty or tax on legacies—generally known as the “legacy duty”—affect such gifts, for they are free from its provisions.³ In this country the same rule prevails with regard to the wills' act as prevails in England.⁴

23. WHEN CAN BE MADE—LAST SICKNESS.—Justinian defined a *donatio mortis causa* as “that which is made to meet the case of death, as when anything is given upon condition that, if any fatal accident befalls the donor, the person to whom it is given shall have it as his own.”⁵ This is broader than the English definition; and, as we

¹ *Edwards v. Jones*, 1 Mylne & Craig, 226; *Emery v. Clough*, 63 N. H. 552; *Duffield v. Elwes*, 1 Bligh, 497; S. C. 1 Dow. & Cl. 1, reversing 1 Sim. & Stu. 239; *Raiche v. Alie*, 1 Rev. Leg. 77; *Dicheschied v. Exchange Bank*, 28 W. Va. 340; *Newton v. Snyder*, 44 Ark. 42.

² *Moore v. Darton*, 4 De Gex. & Sm. 517; S. C. 20 L. J. Ch. 626; *Meach v. Meach*, 24 Vt. 591, 596.

³ *Farquharson v. Cave*, 2 Colly. 356, 366.

⁴ *Dole v. Lincoln*, 31 Me. 422. See Section 41. (*All property given, not valid.*) Where a father attempted to make a *donatio mortis causa*, but only succeeded in making a bailment of the subject-matter of the gift, and at the same time he gave instructions as to the settlement of his landed estate, in which he directed a portion of the gift to be used and made provision for the payment of his debts, the entire transaction was held to be in contravention of the wills' act: *McCord v. McCord*, 77 Mo. 166.

⁵ *Sandar's Justinian*, p. 147.

have seen, Bracton¹ lays down several instances in which such gifts are valid, which are now held invalid. "It is of the essence of a *donatio mortis causa*," said Sir Lancelot Shadwell, vice-chancellor, "that the gift shall be proved to have been made in contemplation of the donor shortly terminating life by reason of extreme sickness or extreme old age."² Whether the last condition would now make the gift valid may well be doubted.³ In another English case it is said that "the person who gives must express or declare himself in such manner as that it may appear that he does it in view and contemplation of his death, which he expects to follow some time after."⁴ This definition, however, is from an old case and is incomplete. If it means that he shall verbally declare himself, or in writing, then it is too restricted; for any signs that convey to the donee, or to some one for him, the design or intention of the owner is sufficient. That part of the definition that the donor makes it "in view and contemplation of his death" is accurate, but the clause "which he expects to follow some time after" is capable of a too extended meaning. It is too indefinite, for all men expect death to follow the making of a gift. "The gift must be made in contemplation of the near approach of death by the donor," said the Supreme Court of California.⁵ Blackstone defines it to be a gift made by "a person in his last sickness, apprehending his dissolution near."⁶ Williams, in his work on Executors, says: "If a gift be not made by a donor in peril of death—*i. e.*, with relation to his decease by illness affecting him at the time of his

¹ See Section 16.

² *Edward v. Jones*, 7 Simm. 325, 335.

³ See Section 24.

⁴ *Parthrick v. Friend*, 2 Colly. 363.

⁵ *Daniel v. Smith*, 64 Cal. 346; *Daniel v. Smith*, 75 Cal. 548.

⁶ 2 Bl. Com. 514.

gift—it cannot be supported as a donation *mortis causa*.”¹ This is quite an accurate statement of the law. In a modern English case it was said: “It appears that the donor at the time was in bed, having an illness from which he never recovered. It is not necessary that the donor should have in contemplation his immediate dissolution, but only the gift should be made upon the supposition that he will not recover. In this case it was, in fact, his last illness, and, so far, the facts are sufficient to satisfy the rule.”² In an American case it is said that “the gift must be conditional, only to take effect by the death of the donor by his existing disorder;”³ and in another American case it is said that “there must be a transfer or delivery of property in expectation of death from an existing illness, the donation depending on the condition of death from such illness.”⁴ In still another case, after reviewing the authorities at length, and pointing out a modification of the rule, it was said: “The modification of this rule, as I have suggested, relates mainly to the manner of the approach of death, and I think there will no case be found where such a gift is upheld, in which there was not either peril of death from some cause imminent and impending, or the conceived near approach of natural death. It is not indeed necessary that the party should be *in extremis*, according to some of the earlier cases, but the gift will be presumed to be in contemplation of death, when the donor is on his death-bed, or languishing in what proves to be his last illness.”⁵ In a North Carolina case it was said of a gift claimed to be a *donatio mortis causa*, “Indeed, it is not

¹ Williams' Executors, 845 (6th Am. ed.).

² Meredith v. Watson, 23 E. L. & Eq. 250; S. C. 2 Eq. Rep. 5.

³ Hebb v. Hebb, 5 Gill (Md.), 506.

⁴ Smith v. Dorsey, 38 Ind., p. 457.

⁵ Irish v. Nutting, 47 Barb. 370, 386.

easy to conceive how a *donatio mortis causa* could be established by any proof in a case like this, where the testator was not surprised by sickness, but lived for months afterward, and had abundant opportunity to make his testamentary dispositions in the regular and ordinary way.”¹ These quotations are amply sufficient to show that the donor must be laboring under an apprehension of pending death from a disease or sickness then afflicting him—a sickness which is his last illness, in order to make a gift *mortis causa* valid.²

24. “IN PERIL OF DEATH.”—It is often said that a gift made “in peril of death” is a valid *donatio mortis causa*; but just what is meant by this phrase does not clearly appear. It does not mean *in extremis*, for that is not essential to the validity of a gift of this kind. Suppose, however, a man is under a sentence of condemnation, to be executed by hanging, shooting, or in any other effectual

¹ Shirley v. Whitehead, 1 Ired. Eq. 130.

² Robson v. Jones, 3 Del. Ch. 51. Where the donor was eighty years of age and quite ill, but did not die until five months afterward, the gift was upheld, there being a continual sickness: Grymes v. Hone, 49 N. Y. 17. So where the donor did not die for six weeks: Williams v. Guile, 117 N. Y. 343, affirming 46 Hun, 645; Conser v. Snowden, 54 Md. 175; Taylor v. Henry, 48 Md. 550; Hebb v. Hebb, 5 Gill (Md.), 506; Sessions v. Moseley, 4 Cush. 87; First Nat. Bank v. Balcom, 35 Conn. 351; Raymond v. Sellick, 10 Conn. 480; Henschel v. Mauer, 69 Wis. 576; S. C. 2 Amer. St. Rep. 757; Kiff v. Weaver, 94 N. C. 274; Nicholas v. Adams, 2 Whar. (Pa.) 17; reversing 1 Miles, 90; Overton v. Sawyer, 7 Jones (N. C.), L. 6; Rhodes v. Childs, 64 Pa. St. 18; Gourley v. Linsenbigler, 51 Pa. St. 345; McCarven's Estate, 7 W. N. C. 261; Kenistons v. Sceva, 54 N. H. 24; Huntington v. Gilmore, 14 Barb. 243; Harris v. Clark, 2 Barb. 94; S. C. 3 N. Y. 93; Van Slooten v. Wheeler, 21 N. Y. Supp. 336; Worth v. Case, 42 N. Y. 362; Champney v. Blanchard, 39 N. Y. 111; Merchant v. Merchant, 2 Bradf. 432; Dole v. Lincoln, 31 Me. 422; Weston v. Hight, 17 Me. 287; Thompson v. Thompson, 12 Tex. 327; French v. Raymond, 39 Vt. 623; Holley v. Adams, 16 Vt. 206; Smith v. Kittridge, 21 Vt. 238; Sheegog v. Perkins, 4 Baxt. 273; Gass v. Simpson, 4 Coldw. 288; Gratton v. Appleton, 3 Story, 755; S. C. 8 L. Rep. 116; Lee v. Luther, 3 Wood & M. 519; Miller v. Miller, 3 P. Wms. 357; Tate v. Hilbert, 2 Ves. Jr. 111; Jones v. Selby, Finch Ch. 300; Hedges v. Hedges, Finch, 269; S. C. Gill 12; 2 Vern. 615; Blount v. Burrow, 1 Ves. Jr. 456; S. C. 4 Bro. C. C. 71; Cosnahan v. Grice, 7 L. J. N. S. 81; 15 Moo. P. C. 215.

manner, and the day or time for his execution is set ; or suppose he is in the hands of a body of lynchers, may he not make a gift *mortis causa* ? It may be that he has hope of a pardon, or of a new trial or of a rescue ; but that is no more reason why the gift should be void than if he had a hope, in the case of sickness, that he would recover ; for few men die who are not possessed with a hope of surviving their sickness up to the moment of the final struggle. There is no reason why such a gift is not valid.¹ Yet “a general apprehension of death from the mortality of men will not be sufficient, but it must be an apprehension arising from the peculiar sickness, or peril, or danger.”² The threatened danger to his life must be the moving cause of his making the gift.³

25. “IN EXTREMIS.”—The old authorities seem to incline toward the proposition that a man must be *in extremis* to make a gift *mortis causa* valid ; and while some of the modern cases⁴ considers that such a rule would be preferable, they admit that such is not the modern rule.⁵ “It is not needful,” said Earl, J., “that the gift be made *in extremis* when there is no time or opportunity to make a will. In many of the reported cases the gift was made weeks, and even months, before the death of the donor when there was abundant time and opportunity for him to have made a will.”⁶

26. EXISTING DISORDER—BURDEN OF PROOF.—“As we have already said it was essential, to make the attempted

¹ See for a discussion of the phrase “in peril of death,” *Robson v. Robson*, 3 Del. Ch. 51 ; *Craig v. Kittredge*, 46 N. H. 57.

² *Sheegog v. Perkins*, 4 Baxt. 273 ; *Gass v. Simpson*, 4 Coldw. 288.

³ *Gass v. Simpson*, 4 Coldw. 288, 298.

⁴ *Robson v. Robson*, 3 Del. Ch. 51.

⁵ *Robson v. Robson*, 3 Del. 51 ; *Gourley v. Linsenbigler*, 51 Pa. St. 345 ; *Rhodes v. Childs*, 64 Pa. St. 18 ; *Williams v. Guile*, 117 N. Y. 343, affirming 46 Hun, 645.

⁶ *Ridden v. Thrall*, 125 N. Y., p. 579.

gift an effective gift *mortis causa*, that the donor should die of the very disorder with which she was suffering when the gift was made, and that there should have been no intervening recovery." Consequently it was held not to be enough to show that the gift was made when the donor was sick, and that she died some three months afterward. The court said that it devolved upon the donee to show that there was no intervening recovery, and that the donor died from the very disease with which she was seized when she made the gift.¹ It must be also shown by the donee that the donor made the gift "with a view to and in expectation of death from the existing disorder."² But these statements have been severely shaken by a recent decision. In the case under consideration a sufferer from disease was about to undergo a severe surgical operation, but it was not doubtful if he would survive. In view of this fact he made a gift. The operation was performed and he died, but his death was occasioned by heart disease, and it did not appear that the fatal disease had any connection with the operation. "Counsel for the appellant," said Earl, J., "would add one more prerequisite to an effectual gift, and that is that the donor, when the gift has been made in the apprehension of death from disease must have died of the same disease, and he calls our attention to expressions of judges to that effect. I have examined all the cases to which he refers, and many more, and find that these expressions were all made in cases where the donor died from the same disease from which he apprehended death when he made the gift, and that none of them were needful to the decisions made.

¹ *Conser v. Snowden*, 54 Md. 175; *Hebb v. Hebb*, 5 Gill (Md.), 506; *Blount v. Burrow*, 1 Ves. Jr. 546; S. C. 4 Bev. C. C. 71.

² *Taylor v. Henry*, 48 Md., p. 559; *Thompson v. Thompson*, 12 Tex. 327; *French v. Raymond*, 39 Vt. 623. See *Grymes v. Hone*, 49 N. R. 17, and *Williams v. Guile*, 117 N. Y. 343, affirming 46 Hun, 645.

The doctrine meant to be laid down was that the donor must not recover from the disease from which he apprehended death. I am quite sure that no case can be found in which it was decided that death must ensue from the same disease, and not from some other disease existing at the same time, but not known. There is no reason for this additional prerequisite. The rule is that the donor must not recover from the disease from which he then apprehended death. If he recovers the gift is void; if he does not recover, and the gift is not revoked, it becomes effectual. In this case the condition was that if he did not recover from the consequence of the operation and return from the hospital the gift should take effect. That was a perfectly lawful condition for him as the owner of the property to impose, and no reason can be perceived for refusing to uphold a gift made under such circumstances. A donor may have several diseases, and may, in making a gift, apprehend death from one and not from the others, and shall the gift be invalid if before he recovers from the disease feared, he dies from one of the other diseases? In such a case it might be, and generally would be, difficult, if not impossible, to tell what share any of the diseases had in causing the death. No medical skill could ordinarily tell that the donor would have succumbed to the disease feared if the other disease had not been present. Here the immediate cause of death appeared to be heart disease, and the autopsy did not disclose that there was any connection between the hernia or the operation and the heart disease. But who could tell that the death would have ensued from the heart disease at that particular time but for the operation? No medical skill can tell that the shock from the operation, and the debility and disturbance caused thereby did not hasten death; and the death, therefore, in a proper sense, may have ensued,

and probably did ensue from both causes. Sound policy requires the laws regulating gifts *causa mortis* should not be extended, and that the range of such gifts should not be enlarged. We, therefore, confine our decision to the precise facts of this case, and we go no further than to hold that when a gift is made in the apprehension of death from some disease from which the donor did not recover, and the apparent immediate cause of death was some other disease with which he was afflicted at the same time, the gift becomes effectual.”¹

27. THE THREATENED DANGER TO HIS LIFE THE CRITERION—BELIEF OF DONOR.—There is no doubt that the donor must consider his life in immediate or almost immediate, danger. He must be, at the time of the gift, under the belief that he is in peril of death, or surrounded by threatened dangers from which he has an immediate existing apprehension of death; and in contemplation of death from sickness, peril or danger, he is thereby moved to make the donation.² A groundless apprehension of death is as effectual to make a gift conditional as if the danger was real. “No one,” said Gibson, C. J., “would hesitate to say that the gift of a man in the predicament of Parolles, when sportively doomed by his friends, in the guise of ferocious enemies, might be recalled.”³

28. GIFT “IN CASE OF DEATH” WHEN NOT IN APPREHENSION OF IT.—A gift *mortis causa*, made while the donor is in full health, or while suffering from a disease that in reasonable expectation will not produce death in the near future, is invalid. Thus a deposit made in a

¹ *Ridden v. Thrall*, 125 N. Y. 572; S. C. 21 An. St. 758; 26 N. E. Rep. 627.

² *Gass v. Simpson*, 4 Coldw. 288, 298; *Parthrick v. Friend*, 2 Colly, 363, note.

³ *Nicholas v. Adams*, 2 Whart. (Pa.) 17. Donor must be very near death in his belief: *Keyl v. Westerhaus*, 42 Mo. App. 49. See *Nelson v. Sudiek*, 40 Mo. App. 341.

bank, while the donor was in full or medium health, "payable also to A, in case of the death of" the donor, was held to be an invalid gift.¹

29. SURGICAL OPERATION.—A donor about to undergo a very severe surgical operation may make a valid gift *mortis causa*, although he have expectations of surviving the operation; and it matters not that several days intervene between the operation and death, and then he die of another disease.²

30. GOING ON A JOURNEY.—Expressions are used in the old authorities that if a man is going on a journey or voyage³ to a distant land, he may make a valid gift;⁴ but it is safe to say that such is not the law now, and it has been so expressly decided. Thus, where one was about to take a journey from Illinois to Massachusetts, handed a sum of money to another with the request that in case he never returned from his journey, the holder should give it to a designated charitable institution; and he returned safely, but died without making any further valid disposition of the money, it was held that the facts constituted neither a gift *inter vivos* nor *causa mortis*.⁵

31. SUICIDE.—A gift *causa mortis* made in contemplation of suicide is not valid, for the donor's life is not in peril when the gift is made.⁶

¹ *Parcher v. Saco, etc., Savings Inst.*, 78 Me. 470; *Craig v. Kittredge*, 46 N. H. 57; *Kenistons v. Sceva*, 54 N. H. 24. See *Blanchard v. Sheldon*, 43 Vt. 512; *Brown v. Moore*, 3 Head, 670; *Walsh v. Kennedy*, 9 Phila. 178; S. C. 2 W. N. C. 437; 31 Leg. Int. 60; *Smith v. Smith*, 30 N. J. Eq. 564; *Voorhees v. Combs*, 33 N. J. L. 494.

² *Ridden v. Thrall*, 125 N. Y. 572; S. C. 21 Am. St. Rep. 758; 26 N. E. Rep. 627, affirming 55 Hun, 185.

³ 2 Reeves Hitt. Common Law, 98.

⁴ See the question from Bracton, Section 2.

⁵ *Roberts v. Draper*, 18 Bradw. 167.

⁶ *Earle v. Botsford*, 23 N. B. 407.

32. GIFT BY REASON OF OLD AGE.—In his commentaries Kent says that “the apprehension of death may arise from infirmity or old age, or from external and anticipated danger.” He cites the Digest¹ to support this statement,² and no other authority. This undoubtedly was the rule of the civil law, but no English or American case can be cited to support it, while on the other hand the statement is expressly denied.³

33. A SOLDIER’S GIFT.—Efforts have been made to enforce the gift of a soldier, made, when he enlisted, upon the condition that, if he never returned from the war for which he enlisted, the gift should become absolute. Thus, an alleged donee of a gun had previously borrowed it of the owner, who had just enlisted to serve as a soldier in the late war of the rebellion. As he was parting with the claimant, the latter asked him, “What about that gun of yours I have?” when the former answered, “Well, if I never return, you may keep the gun as a present from me.” He never returned; but it was held that the facts did not make a gift, neither *inter vivos* nor *causa mortis*.⁴ So, where a soldier was home on a furlough, he delivered three promissory notes he held on a third party to the plaintiff: “I give you these notes; if I never return, they are yours.” The donor died in the army at the front. It was held an *inter vivos*. “The element of illness,” said the court, “in any degree does not enter into the case, nor does it come within the category of the conceived near approach of death from an impending or apprehended peril. The alleged donor was in good health, many hundred miles from the seat of war, and if he

¹ Dig. 39, 6, sects. 3, 4, 5, 6.

² 2 Kent Com. 441.

³ *Irish v. Nutting*, 47 Barb. 370, 385.

⁴ *Smith v. Dorsey*, 38 Ind. 451.

'snuffed the battle, the thunder of the captains and the shouting,' it was indeed 'afar off'—too far to give any one not utterly craven-hearted the least apprehension or disturbance. The only expression he made having any relevancy to a possibly expected war was that he was going to a dangerous place and might never return. So it is dangerous to leave home on a railroad journey or a steamboat excursion, or to ride forth after a pair of spirited horses; but no one would think either of these such an impending peril as to justify a man in giving away his earthly goods, under the conception that death was near at hand if not already knocking at the door. In short, a vague and general impression that death may occur from those casualties which attend all human affairs, but which are still too remote and uncertain to be regarded as objects of present contemplation and apprehended danger, is not sufficient to sanction such a gift as the one which is claimed in this case. The party must be in a condition to fear approaching death from a proximate and impending peril, or from illness preceding expected dissolution."¹ But the authorities are divided upon this question. The cases given are where the donor had just enlisted, or where he was returning to his regiment at the expiration of his furlough. In the latter instance it does not appear whether his regiment was in the extreme front, in immediate contact with the enemy, or not. But in Tennessee a case somewhat different from those cited above was upheld. There a man left that State, in 1862, for the

¹ *Irish v. Nutting*, 47 Barb. 370; *Sheldon v. Button*, 5 Hun, 110; *Dexheimer v. Gautier*, 34 How. Pr. 472; *S. C. 5 Rob. (N. Y.) 216*; *Gourley v. Linsenbigler*, 51 Pa. St. 345. "In my opinion, these latter decisions are clearly correct. If such gifts were valid as *donatio causa mortis*, on the same ground gifts made at any time by persons having a chronic disease, although in no immediate danger, would be equally good, because their lives are more likely to be shortened than those of persons in health" (*Pomeroy Eq. Jur.*, sect. 1146, note 1).

purpose of avoiding the Confederate conscription, and of going to Kentucky and joining the Federal army. This he accomplished and died in the front. Before going he made a conditional gift of a certain sum of money, to become absolute in case he never returned; and the gift was upheld.¹ A similar rule seems to have been indorsed in Illinois, where the gift was made at the time of the enlistment.² In Indiana a soldier home on a furlough deposited a sum of money, and the depositor executed a written instrument, acknowledging the receipt of the money, promising to pay it on demand, and, in case of the depositor's death, agreeing to pay it to the depositor's sister or her guardian. The donor died, and the money was paid over to the guardian according to the agreement. This was held to be a valid gift to the sister, and that her brother who survived the dead soldier was not entitled, as heir, to a part of it.³

34. LENGTH OF TIME INTERVENING BETWEEN GIFT AND DEATH.—There is no rule regarding the interval of time between the making of the gift and the death of the donor. The gift must be made by the donor in view of his approaching death; and this is one of the essential points in the transaction. In one case the donor lived five months after making the gift, and it was held valid. In referring to this fact the court said: "But we are referred to no case or principle that limits the time within which the donor must die to make such a gift valid. The only rule is that he must not recover from that illness. If he do so, the gift is avoided."⁴ It is clear that the

¹ *Gass v. Simpson*, 4 Coldw. 288.

² *Virgin v. Gaither*, 42 Ill. 39.

³ *Baker v. Williams*, 34 Ind. 547.

⁴ *Grymes v. Hone*, 49 N. Y. 17; *Williams v. Guile*, 117 N. Y. 343, affirming 46 Hun, 645.

donor need not be in such extremity as is requisite to give effect to a nuncupative will; and the making of a will after the alleged *donatio causa mortis* is not conclusive evidence that the gift was not made during such a last sickness as the law requires.¹

35. GIFT BY DEED OR IN WRITING.—In early times a gift *causa mortis* would not be made in writing or by deed² where the delivery of such writing or deed took the place of an actual manual delivery of the thing given. But it is now settled that such a gift is valid.³ In such an instance if the donor recover the gift is revoked, even though it be by deed.⁴ Of course there must be a delivery of the writing or deed, either to the donee or to some person for the donee;⁵ and some authorities hold that there must also be a delivery of the thing given.⁶ The deed or writing cannot serve the purpose of a will, unless it is executed as the statute of wills requires a will to be executed.⁷

36. DONATIO CAUSA MORTIS IN TRUST FOR DONEE.—A *donatio causa mortis* may be made in trust for the benefit of the donee. In this respect it does not differ from a gift *inter vivos*;⁸ but the trust must be a part of

¹ *Nicholas v. Adams*, 2 Whart. (Pa.) 17; reversing *Adams v. Nicholas*, 1 Miles, 90. See, also, *Ridden v. Thrall*, 125 N. Y. 572.

² See *Tate v. Hilbert*, 2 Ves. Jr., p. 120.

³ Section 75; *Ward v. Turner*, 2 Ves. Sr. 431, 439; *Ellis v. Secor*, 31 Mich. 185; *Singleton v. Cotton*, 23 Geo. 261; *Burney v. Ball*, 24 Geo. 505; *Kenistons v. Scava*, 54 N. H. 24; *Johnson v. Smith*, 1 Ves. Sr. 314; *Gaunt v. Tucker*, 18 Ala. 27. See *Farquharson v. Cave*, 2 Colly, 356, 365 note.

⁴ *Curtiss v. Barrus*, 38 Hun, 165; *Smith v. Downey*, 3 Ired. Eq. 268.

⁵ *Kemper v. Kemper*, 1 Duv. (Ky.) 401.

⁶ *Smith v. Downey*, 3 Ired. Eq. 268; *McGrath v. Reynolds*, 116 Mass. 566. *Contra Ellis v. Secor*, 31 Mich. 185.

⁷ *Smith's Eq.* 531. The fact that a gift was made by deed when the donor was sick a-bed and knew he would never recover, does not alone make the gift one *causa mortis*: *Carty v. Connolly*, 91 Cal. 15.

⁸ *Dresser v. Dresser*, 46 Me. 48; *Dunne v. Boyd*, 8 Ir. Eq. 609 (1874).

the donation, and be either contemporaneous with it, or be so coupled with it by contemporaneous words of reference as in effect to be incorporated with it.¹ Where a gift *causa mortis* was made in trust, directions being given as to the disposition of a part of the money, but none as to the remainder, the gift was upheld so far as the directions were specific, and void as to such remainder.²

37. A CONDITIONAL GIFT IMPLIED.—A *donatio causa mortis* is always a conditional gift—conditioned that the donee survive the donor, and that it is only to be effectual on the death of the donee. It is not necessary, however, that the donor should so expressly limit the gift at the time he makes it, nor in fact at any time. “This bond was given in the extremity of sickness,” said Sir John Leach, “and in contemplation of death; and it is to be inferred that it was the intention of the donor that it should be held as a gift only in case of his death. If a gift is made in expectation of death, there is an implied condition that it is to be held only in the event of death.”³ “The condition,” said an American court, “need not be expressed, as it is always implied when the gift is made in the extremity of sickness, or in contemplation of death.”⁴ A further condition is that the donor may at any time revoke the gift.

38. CONDITIONAL DONATIO CAUSA MORTIS.—Like a gift *inter vivos*, a gift *causa mortis* may be made upon a condition. The expression of the condition, however,

¹ *Dunne v. Boyd*, 8 Ir. Eq. 609 (1874).

² *Beals v. Crowley*, 59 Cal. 665.

³ *Gardner v. Parker*, 3 Madd. 102; *Edwards v. Jones*, 1 My. & Cr. 226; *Staniland v. Willott*, 3 MacN. & G. 664; *Earle v. Botsford*, 23 N. B. 407.

⁴ *Emery v. Clough*, 63 N. H. 552; *Henschel v. Maurer*, 69 Wis. 576; S. C. 2 Am. Et. Rep. 757; *Conser v. Snowden*, 54 Md., p. 183; *Taylor v. Henry*, 48 Md., p. 559. See *Edwards v. Jones*, 7 Sim. 325, 335.

must form a part of the donation, and be either contemporaneous with it, or be so coupled with it by contemporaneous words of reference as in effect to be incorporated with it.¹

39. GIFT INTER VIVOS DURING ILLNESS.—Although there is a presumption that a gift made during the last illness of the donor is a *donatio mortis causa*,² yet this presumption may be overcome, and it be shown that a gift made under such circumstances was in fact an absolute gift—a gift *inter vivos*. “Where a gift of personal property is made with intent to take effect immediately and irrevocably,” said the Supreme Court of Wisconsin, “and is fully executed by complete and unconditional delivery, it is certainly binding upon the donor as a gift *inter vivos*, even if the donor at the time is *in extremis*, and dies soon after.”³ But where such intent is not manifest and the gift is otherwise made, under such circumstances it will ordinarily be regarded as a gift *causa mortis*.⁴

40. A WILL INSUFFICIENTLY EXECUTED CANNOT BE DEEMED A DONATIO CAUSA MORTIS.—If a gift by will fails because the instrument is not executed as the statute requires, it cannot be deemed and construed a *donatio causa mortis*; and this, too, even though the will only fails because it is improperly attested.⁵ Thus some

¹ Dunne v. Boyd, 8 Ir. Eq. 609 (1874).

² Gardner v. Parker, 3 Madd. 102.

³ Citing Tate v. Leithhead, Kay, 658, and McCarty v. Kearnan, 86 Ill. 291; Carty v. Connolly, 91 Cal. 15.

⁴ Henschel v. Maurer, 69 Wis. 576; 2 Am. St. Rep. 757; Rhodes v. Childs, 64 Pa. St. 23; Grymes v. Hone, 49 N. Y. 17; S. C. 10 Am. Rep. 313; Dresser v. Dresser, 46 Me. 48.

A deed executed on death-bed of donor was held not to be a *donatio mortis causa*; and the mere fact that it was thus executed did not cast on the donee the burden of showing that it was not such a gift: Carty v. Connolly, 91 Cal. 15.

⁵ Mitchell v. Smith, 33 L. J. Ch. 596; S. C. 12 W. R. 941; 10 L. T. (N. S.)

months before his death a testator gave his nephew, who was residing with him, certain promissory notes, of which he was the holder and payee, with the words: "I give you these notes," adding soon after, that S. should have them at his death, but that he wished to be master of them as long as he lived. On the same day all the notes were indorsed with these words: "I bequeath, pay the within contents to S., or his order at my death," and this indorsement was signed by the testator, and attested by a single witness. This was held to be only a testamentary disposition of the property, which failed through informality, and was not *donatio causa mortis*; but it was said that if the payee had not expressed an intention to keep the ownership during his life, the disposition might have been construed as a gift *inter vivos* in trust for the donor for life, and afterward for the indorsee absolutely.¹

41. GIFT OF ENTIRE ESTATE CANNOT BE MADE *MORTIS CAUSA*.—In Pennsylvania the court declined to uphold a gift *causa mortis* of the entire estate of the donor, because it overthrew the provisions of the statute of wills. In that case the donor went to the house of his sister-in-law, taking all her property with her, and rented a room in the house. Some of the articles were in two trunks, others in the band-box, and others hanging in a closet in the room. Three days after making this move, the donor died. Shortly before her death she said, addressing the donee, "I am dying; all that I have is here, and all is yours; do everything for me; there are my keys, take them." The articles in the trunk were worth several

801; 4 De. G., J. & S. 422; Earle v. Botsford, 23 N. B. 407; McGrath v. Reynolds, 116 Mass. 566.

¹ Mitchell v. Smith, *supra*. If it is the design of the donor that an instrument should operate in his lifetime it will not be construed as a will, though containing expressions like those frequently used in drawing wills: Faulk v. Faulk, 23 Tex. 653.

hundred, probably two thousand, dollars. "The gift in the case before us," said the court, "professes to embrace all the donor's property, and to be made in prospect of death, and is therefore a will, if it receive the sanction of law. . . . This case is so entirely peculiar in its character that, if we take our statute of wills as the general rule for such dispositions, as we are bound to do, and treat the case of *donationes mortis causa* as exceptions which are not to be extended by way of analogy, then we are clear of all embarrassment as to the principle on which the case is to be decided. It is not pretended that any gift like this has ever been held good, and it may be safely declared that no mere gift made in prospect of death and professing to pass all one's property to another, to take effect after death, can be valid under our statute of wills, no matter what delivery may have accompanied it. If this is not true, then it is plain that the statute of wills, so far as it is intended to change all modes of disposing of personal property at death which it does not provide for, is repealed by the decisions of the courts. It is not necessary to point out the danger of sustaining such a donation as this, for no thinking mind can fail to see it, and it was this very consideration that led to the precautions which are provided in the statute on the subject of nuncupative wills. We cannot even glance at the these precautions without seeing that they were designed to defeat a gift sustained by such evidence as was given in this case, and to prevent oral dispositions in the nature of last wills from being made under such suspicious circumstances." ¹ But of this case it was subsequently said: "In that case there was a variety of chattels—they were not specified—nothing more than a constructive delivery

¹ Headley v. Kirby, 18 Pa. St. 326; S. C. 1 Amer. L. Reg. (O. S.) 25; Marshall v. Berry, 13 Allen, 43; Meach v. Meach, 24 Vt. 591.

occurred—the language was evidently testamentary—and it referred expressly to all her property. In these particulars the case is broadly distinguished from the present, and it does not decide that where a single chattel is the whole of a man's estate, or the 'principal part of his property,' it may not be given *causa mortis*. The doctrine of that case, predicated of the circumstances then before the court, is not to be questioned, for it rests on sound reasons; but, if applied to a case like this, it would defeat all gifts made as memorials of gratitude and affection in the most solemn manner." Consequently a gift of the principal part of the donor's property was upheld;¹ and so has a gift of all his property been held valid.²

42. EFFECT OF A RECOVERY FROM ILLNESS.—If the donor recover from the sickness during which he made the gift, the gift is revoked, and he may reclaim it. All the authorities are agreed upon this point;³ for the gift is always made upon the condition, expressed or implied, that it is to be void if the donor recover from his present illness.⁴ In such an instance, upon his recovery the donor may revoke the gift; and if he do not do so in his lifetime, his personal representative may do so. Thus where the donor recovered and then became insane, it was held that his committee could recover the thing given from the donee.⁵ The question is one that necessarily arises, what is a recovery; or what is such a recovery as

¹ *Michener v. Dale*, 23 Pa. St. 59. See *Harmon v. Osgood*, 151 Mass. 501.

² *Thomas v. Lewis*, 15 S. E. Rep. (Va.) 389. Of course it is void if there are any debts: *Wetmore v. Brooks*, 18 N. Y. Supp. 852 (by statute.)

³ *Grymes v. Hone*, 49 N. Y. 17.

⁴ *Gardner v. Parker*, 3 Madd. 185; *Merchant v. Merchant*, 2 Bradf. 432; *Rhodes v. Childs*, 64 Pa. St. 18; *Thompson v. Thompson*, 12 Texas, 327; *Smith v. Downey*, 3 Ired. Eq. 268; *Thomas v. Lewis*, 15 S. W. Rep. 389.

⁵ *Staniland v. Willott*, 3 MacN. & G. 664; *Henry v. Fowler*, 3 Daly, 199. *Quære*, does the birth of a posthumous child work a revocation of a *donatio mortis causa*? *Bloomer v. Bloomer*, 2 Bradf. 339. It certainly does not.

will defeat the gift? This is difficult to answer, for there is no light upon the subject. A man who is in imminent peril because of a sickness or disorder that possesses him is usually confined to his bed; and if he so far recover as to leave his room and his house, and to attend to some of his daily affairs, it cannot be said that the gift is unrevoked. A man with a chronic disease may be afflicted for years with his disorder, and may well know and consider that he never will recover; and yet a gift made while he is going about his usual and daily occupations could not be considered as made during his last illness, although he might die within the next twenty-four hours. A man having the heart disease severely is usually in imminent peril of death, and still performs all the avocations of a well man; yet a gift made by him as a *donatio mortis causa* would not be valid though he were stricken and die within the next three minutes, unless, at the time of the gift, he had clear premonition of his approaching death. Perhaps, it may be said that if the donor so far recover that he has such hope of his complete or temporary recovery that he does not consider that he will die of his present severe illness, and believes that he will again recover his accustomed condition of health; and he so far approaches the condition his belief leads him to believe he will attain as to be able in a measure to resume his usual avocations or superintend his affairs, although he does not leave his residence, the gift may be considered revoked. Further than this it is difficult to go.

43. DONEE DYING BEFORE DONOR.—If the donee die before the donor, the gift is avoided and a nullity;¹ for the gift is upon the condition, implied by law, that the donee survives the donor.²

¹Gourley v. Linsensbigler, 51 Pa. St. 345.

²Smith v. Ferguson, 90 Ind. 229; Huntington v. Gilmore, 14 Barb. 243; Jones

44. REVOCATION DURING HIS LIFETIME BY DONOR.—

All the authorities admit that the donor, at any time during his lifetime, may revoke a *donatio mortis causa*; for the gift, although assented to by the donee, is not perfected until the donor dies.¹ Of course, a very sick man, fully expecting to die from his then sickness, may make an irrevocable gift *inter vivos*; for the fact of his sickness does not prevent him from so doing; and if he make such a gift, it is irrevocable after it is perfected. But this rule is made with the proviso that the revocation is made when the donor has mind enough to understand what he is doing; for a revocation by a donor insane at the time, which is not subsequently ratified by him during a lucid interval, is no revocation; and the gift would still remain good. Yet if the donee were to acquiesce in the revocation of the donor when insane, and were, at least, to deliver up the article given, this would amount to an abandonment on his part; and he could not again reclaim it, more especially could he not reclaim it after the demise of the donor, who even should die without knowledge of, or a lucid interval between, the revocation and his death.

45. REVOCATION BY WILL.—A gift *mortis causa*, it is said, cannot be revoked by the will of the donor; and the reason assigned for this is that the will not operating until the donor's death, and such donor, at his decease, is divested of his property in the subject

v. Selby, Finch, 300; *Henschel v. Maurer*, 69 Wis. 576; S. C. 2 Am. St. Rep. 757; *Michener v. Dale*, 23 Pa. St. 59. See Section 123.

¹ *Dickeschied v. Bank*, 28 W. Va. 340, 360; *Emery v. Clough*, 63 N. H. 552; *Gano v. Fisk*, 43 Ohio St. 462; *Bunn v. Marham*, 7 Taunt. 224; *Daniel v. Smith*, 64 Cal. 346; *Parish v. Stone*, 14 Pick. 198; *Henschel v. Maurer*, 69 Wis. 576; S. C. 2 Am. St. Rep. 757. See Section 42. This was the rule of the Roman law: *Sandar's Justinian*, p. 147.

of the gift, no right or title in it passes to his representatives.¹

46. WHEN TITLE TO THING GIVEN PASSES.—Some little confusion has arisen concerning the time when the title to the thing given passes from the donor to the donee. Does it pass at the time delivery is made to the donee, or only when the donor dies? Or does it pass at the time of the delivery, conditioned that if the donor recover, or revoke the gift, or the donee does not survive the donor, it shall revert to the donor? There is some confusion in the books on this subject, probably rising from the two rules recognized by the Roman law. At Rome two modes of *donatio mortis causa* were recognized. "In one, the subject of the gift was given on condition that it should become the property of the donee in the event of the donor's death; in the other, the subject of the gift became at once the property of the donee, but on condition that he should return it to the donor in the event of his recovery."² The English courts seem to have adopted the former rule. Thus it is said in one reported case that "*A donatio mortis causa* leaves the whole title in the donor, unless the event occurs which is to divest him." Again: "A party making a *donatio mortis causa* does not part with the whole interest, save only in a certain event; and it is of the essence of such a gift that it shall not otherwise take effect."³ So in a very celebrated case, speaking of the power of the courts to enforce an incomplete gift, Lord Eldon said: "I apprehend that in a case where a *donatio mortis causa* has been carried into effect by a

¹ *Emery v. Clough*, 63 N. H. 552; *Jones v. Selby*, Finch, 300 (*quære*); *Ham-brooke v. Simmons*, 4 Russ. 25 (*quære*); *Johnson v. Smith*, 1 Ves. Sr. 314.

² *Smith's Equity*, 528.

³ *Edwards v. Jones*, 1 Mylne & Cr. 226. The court here is "speaking of the gift itself, and not of the mere act of delivery, or that which is equivalent thereto:" *Staniland v. Willott*, 3 MacN. & G. 664.

court of equity, that court of equity has not considered the interest as vested by the gift, but that the interest is so vested in the donee that that donee has a right to call on a court of equity, and, as to the personal estate, to compel the executor to carry into effect the intention manifested by the person he represents.”¹ Some American cases have adopted this rule.² On the other hand, it is said that the “title to a gift *causa mortis* passes by the delivery only in the lifetime of the donor, and his death perfects the title in the donee by terminating the donor’s right or power of defeasance;”³ and this is the better view.⁴

47. ADMINISTRATOR OR EXECUTOR HAS NO CONTROL OVER PROPERTY GIVEN—PROOF IN PROBATE COURT.—The property given does not pass to the administrator or executor of the donor. He has no control over it. It is not necessary to prove it in the Probate Court, even though it be in writing or a deed.⁵ No act or assent on the part of the administrator is necessary. The gift is not taken from him, but against him.⁶ If the administrator or executor obtain possession of the subject-matter of the gift, he is liable to an action of assumpsit for its value.⁷

48. CONTRIBUTION WITH LEGATEES.—Unlike legacies, if the assets of the estate are insufficient to pay all the

¹ Duffield *v.* Elwes, 1 Bligh (N. S.), 497, 534; S. C. 1 Dow. H. 268.

² Huntington *v.* Gilmore, 14 Barb. 243.

³ Emery *v.* Clough, 63 N. H. 552.

⁴ Nicholas *v.* Adams, 2 Whart. (Pa.) 17; Marshall *v.* Berry, 13 Allen, 43, 46; Trorlicht *v.* Weizenecker, 1 Mo. App. 482; Daniel *v.* Smith, 64 Cal. 346; Parish *v.* Stone, 14 Pick. 198; Devol *v.* Dye, 123 Ind. 321. The case of Barnes *v.* People, 25 Ill. App. 136, is certainly erroneous; *donatio inter vivos*, Section 263.

⁵ Emery *v.* Clough, 63 N. H. 552; Raymond *v.* Sellick, 10 Conn. 480, 485.

⁶ Tate *v.* Hilbert, 2 Ves. Jr. 111; Gaunt *v.* Tucker, 18 Ala. 27; Ashton *v.* Dawson, Sel. Ch. Cas. 14; Borneman *v.* Sidlinger, 18 Me. 225.

⁷ Michener *v.* Dale, 23 Pa. St. 59.

legatees, a donee of a gift *mortis causa* is not liable to contribution. He has his gift at the death of the testator and retains it in full, although every devise under the will must fail because of the lack of assets or property of the estate.¹

49. SUBJECT TO DONOR'S DEBTS.—A donor may not make a gift unless he has left sufficient property to pay his debts. His creditors stand first, the donees second. He must be just before he is generous—just to his creditors, generous to his beneficiaries. A *donatio mortis causa* is always, therefore, liable to be taken to pay the donor's creditors, if there be not sufficient property of his estate to pay them.² But if the donee is a creditor of the estate it is no defense to an action brought by him to recover the property from the administrator, that the gift is necessary to pay the donor's debts, where there is a sufficient amount of assets left to pay all the other creditors than himself. In such an instance he elects to take the gift rather than to insist that his claim shall be paid.³ He may not, however, insist that both his claim be paid and his gift upheld, if he thereby would deprive any of the other creditors of the amounts due them.

¹ Emery v. Clough, 63 N. H. 552; Gaunt v. Tucker, 18 Ala. 27.

² Tate v. Leithead, Kay, 658; Mitchell v. Pease, 7 Cush. 350; Chase v. Redding, 13 Gray, 418; Wetmore v. Brooks, 18 N. Y. Supp. 852 (by statute); Davis v. Ney, 125 Mass. 590; Michener v. Dale, 23 Pa. St. 59. The creditors may reach the property on trustee process: Harmon v. Osgood, 151 Mass. 501.

³ Pierce v. Boston Five Cents Savings Bank, 129 Mass. 425; S. C. 37 Am. Rep. 371.

CHAPTER III.

DONOR AND DONEE.

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| 50. General Rule—Conversion. | 62. Administrator or Executor of Donor. |
| 51. Donee Must Be Certain. | 63. Donor's Gift to His Illegitimate Children or Mistress. |
| 52. Infant Donor. | 64. Dead Person—Donee in Ventre sa Mere. |
| 53. Infant Donee. | 65. Private Corporation. |
| 54. Husband to Wife. | 66. Gift to Officer of Corporation to Unduly Influence His Action. |
| 55. Wife as Donor. | 67. Corporation as Donee. |
| 56. Wife as Donee of Third Person. | 68. Municipal Corporation as Donor. |
| 57. Foreigner as Donee. | 69. Municipal Corporation as Donee. |
| 58. Legislature as Donor. | |
| 59. Slave as Donee. | |
| 60. Lunatic as Donor. | |
| 61. One of Two Donees or More Incapable of Taking. | |

50. GENERAL RULE—CONVERSION.—Any one not insane, and twenty-one years of age, and not a married woman, may be a donor, as a general rule. Of course, one not the owner of property cannot give it away so as to confer a title on the donee any more than he may sell it. A gift of such property, using all the formalities of a valid gift, including a delivery to the donee, would be a conversion, and either the donor or donee, or both, would be liable to the owner for its value. As between the donor and donee, the gift would be valid, as much so as if it were a sale.

51. DONEE MUST BE CERTAIN.—The object of the donor's bounty must be clearly pointed out, and not rest in mere conjecture or be a matter of speculation. Thus, where a lady drew a check on her son-in-law, who had her moneys in his hands, in favor of her daughter, his wife, but afterward told him to hold the money in trust for his

wife during her life and afterward for her children, it was held that the oral direction superseded the written check, and that, under the oral directions, the objects of the gift were not sufficiently designated.¹

52. **INFANT DONOR.**—An infant cannot bind himself by a sale of his property, nor can he bind himself by a gift of it. Neither the one nor the other is binding upon him; and very much less so upon his guardian, when he has one. His guardian may revoke his disposal of his property, both by sale and gift, and recover possession thereof; for the possession of an infant's estate is in his guardian.² "And it is to be known," says Bracton, "that all persons are prohibited to make a donation, who have not a general and free administration of their own affairs, as those minors, who are under guardianship or curatorship, and who do not know how to regulate themselves, but they may receive (under the authority of a guardian) and may make their own condition better. But they cannot give away, nor make their own condition worse. And for this reason they cannot give away, because they cannot consent to a donation, neither with nor without the authority of a guardian."³

53. **INFANT DONEE.**—An infant may be a donee, and the gift will be binding upon his adult donor. A gift to an infant belongs to the infant and not to his parent; and the latter may not use the thing given for his own use and benefit. If a minor receives a gift of much value, the usual practice is to have a guardian appointed to take

¹ *Hughes v. Stubbs*, 11 Jur. N. S. 913; S. C. 13 L. T. N. S. 492. See *Roberts v. Roberts*, 11 Jur. N. S. 992; *Holeman v. Fort*, 3 Strob. Eq. 66; *Sheedy v. Roach*, 124 Mass. 472; *Barnum v. Reed*, 136 Ill. 388.

² *Boruff v. Stipp*, 126 Ind. 32.

³ 1 Bract. (Twiss ed.) 94; 4 Ib. 275. An emancipated minor cannot make a binding gift of his property: *Johnson v. Alden*, 15 La. Ann. 505.

charge of the property given.¹ But it is easy to see that a gift may entail upon an infant's estate, although it was absolutely unconditional, such a burden and expense that its acceptance would be a positive injury to him. In such an instance the courts would, no doubt, refuse to uphold it, and this, too, even if his guardian consent to it, in an instance where its acceptance was clearly a burden without adequate compensation.²

54. HUSBAND TO WIFE.—A husband may make a gift directly to his wife without the intervention of a trustee; and equity will sustain it. Such a gift may be by deed or by parol; and may be of personal or real property.³

¹ *Keeler v. Fassett*, 21 Vt. 539; *Jackson v. Combs*, 7 Cow. 36; *Miles v. Boyden*, 3 Pick. 213; *Cowell v. Daggett*, 97 Mass. 434; *Kenningham v. McLaughlin*, 3 Mon. 80; *Perry v. Carmichael*, 95 Ill. 519; *Clark v. Smith*, 13 S. C. 585. Bracton recognizes the validity of a gift to a minor: 1 Bract. (Twiss ed.) 93, 101.

² A father may give his child his own earnings, at least when not in fraud of his creditors: *Moody v. Walker*, 89 Ala. 619; and the son may then make a valid contract with him concerning them: *Danley v. Rector*, 5 Eng. (Ark.) 211.

³ *Deming v. Williams*, 26 Conn. 226; *Slanning v. Style*, 3 P. Wms. 334; *Lucas v. Lucas*, 1 Atk. 270; *Freemantle v. Bankes*, 5 Ves. 79; *Battersbee v. Farrington*, 1 Swanst. 106; *Latourette v. Williams*, 1 Barb. 9; *Neufville v. Thomson*, 3 Fdw. 92; *McKenna v. Phillips*, 6 Whart. 571; *Kee v. Vasser*, 2 Ired. Eq. 553; *Stanwood v. Stanwood*, 17 Mass. 57; *Phelps v. Phelps*, 20 Pick. 556; *Adams v. Brackett*, 5 Met. 280; *Jones v. Obenchain*, 10 Gratt. 259; *Schooler v. Schooler*, 18 Mo. App. 69; *McCoy v. Hyatt*, 80 Mo. 130; *Armitage v. Mace*, 96 N. Y. 538; *Phillips v. Wooster*, 36 N. Y. 412; *Whiton v. Snyder*, 88 N. Y. 299; *Shuttleworth v. Winter*, 55 N. Y. 624; *Sanford v. Finkle*, 112 Ill. 146; *Succession of Hale*, 26 La. Ann. 195; *Hilton v. Morse*, 75 Me. 258; *Lane v. Lane*, 76 Me. 521; *Tullis v. Fridley*, 9 Minn. 79; *Bradshaw v. Mayfield*, 18 Tex. 21; *Hawkins v. Lee*, 22 Tex. 544; *Fitts v. Fitts*, 14 Tex. 443; *Clawson v. Clawson*, 25 Ind. 229; *Sims v. Rickets*, 35 Ind. 181; *Kane v. Desmond*, 63 Cal. 464; *Hart v. Robertson*, 21 Cal. 346; *Hess v. Brown*, 111 Pa. St. 124; *Walsh v. Chambers*, 13 Mo. App. 301; *Bettes v. Magoon*, 85 Mo. 301; *Ruse v. Bromberg*, 88 Ala. 619; *Lanmons v. Allen*, 88 Ala. 417; *Craig v. Monitor*, 76 Ia. 577; *Callender v. Horner*, 26 Neb. 687; *Tyrrell v. York*, 57 Hun, 292; *Fruhauf v. Bendheim*, 127 N. Y. 587. Such a gift creates in her a separate estate without words to that effect: *Carpenter v. Franklin*, 89 Tenn. 142; and when she is his executrix she is not chargeable with it as such: *In re Stevens*, 83 Cal. 322; *Hayes v. Alliance, etc., Ins. Co.*, 8 Ir. Rep. 149 (1881); *Walter v. Hodge*, Wils. Ch. 445.

"The legal unity of husband and wife have, in Georgia, for most purposes,

Formerly it was held that she could not take a gift from him ; and this arose because of the legal fiction that husband and wife are one, and possession by the donee being essential to the validity of every gift, her possession was her husband's, and thus, as toward her, he could not divest himself of the possession of the thing given ; and the gift must, therefore, fail.¹ To this there was an exception in the case of pin money or paraphernalia.² The earnings of a wife become hers without any express gift, if she is permitted to receive and retain them in her own name for her own benefit.³

been dissolved, and a legal duality established. A wife is a wife, and not a husband, as she was formerly. Legislative chemistry has analyzed the conjugal unit, and it is no longer treated as an element, but as a compound. A husband can make a gift to his own wife, although she lives in the house with him and attends to her household duties, as easily as he can make a present to his neighbor's wife. This puts her on an equality with other ladies, and looks like progress. Under the new order of things, when he induces her to enter into the business of keeping boarders, and promises to let her have all the proceeds, he is allowed to keep his promise if she keeps the boarders. It would seem that the law ought to tolerate him in being faithful to his word in such a matter, even though he has pledged it only to his wife, and we think it does :'' Chief Justice Bleckley in *McNaught v. Anderson*, 78 Geo. 499.

¹ *Lucas v. Lucas*, 3 Atk. 270 ; *Phillips v. Barnet*, L. R. 1 Q. B. Div. 436 ; *Roe v. Wilkins*, 4 A. & E. 86. Where a statute provided that all her personal property consisting of money should be his so long as it was not invested, and a husband allowed his wife to purchase land with the proceeds of her separate estate, was not conclusive that it was a gift, though title to the land was taken by her in her own name : *Yesler v. Hochstettler*, 30 Pac. Rep. 398. In New Jersey she may take a mortgage on his lands through the intervention of a third person : *Stoy v. Stoy*, 41 N. J. Eq. 370.

² *Burton v. Pierpoint*, 2 P. Wms. 78 ; *Jervoise v. Jervoise*, 17 Bev. 566 ; *Grant v. Grant*, 34 L. J. Ch. 641 ; *Williams v. Mercier*, 9 Q. B. Div. 337 ; *Macqueen's H. & W.* 115 ; *Slanning v. Style*, 3 P. Wms. 333.

³ *Carpenter v. Franklin*, 89 Tenn. 142. Even as against his then existing creditors he may make the gift : *Tresch v. Wirtz*, 34 N. J. Eq. 124 ; affirmed 36 N. J. Eq. 356 ; *Peterson v. Mulford*, 36 N. J. L. 481. *Contra*, *Cramer v. Reford*, 17 N. J. Eq. 367. Although a wife deliver back a deed-gift of lands to her husband, the lien of a judgment against her at the time will attach : *Craig v. Monitor Plow Works*, 76 Ia. 577.

In Massachusetts the power of a husband or wife to make gifts to each other is limited to a certain amount and of certain property : Pub. Stat., 1882, p. 819,

55. WIFE AS DONOR.—Whether or not a wife's gift of her personal property to a person not her husband is valid depends upon the law of the place without reference to her domicile.¹ If the common law there prevails in its full vigor, then she cannot make a gift without her husband's consent; and this is true of her *donatio mortis causa*, which is put upon the same footing with her will.² In all such instances, his consent may be inferred from circumstances; and whether such inference is to be made is ordinarily a question of fact for the jury.³ But she may make a valid gift direct to her husband, and his acceptance is his assent that it may be made; and

sect. 3; *Spelman v. Aldrich*, 126 Mass. 113; *Amer v. Chew*, 5 Met. 320; *Thompson v. O'Sullivan*, 6 Allen, 303; *Gay v. Kingsley*, 11 Allen, 345; *Adams v. Brackett*, 5 Met. 280; *Marshall v. Jaquith*, 134 Mass. 138; *Carley v. Green*, 12 Allen, 104; *Baxter v. Knowles*, 12 Allen, 114; *Edgerly v. Whalan*, 106 Mass. 307; *Phelps v. Phelps*, 20 Pick. 556.

¹ *Emery v. Clough*, 63 N. H. 552.

² *Jones v. Brown*, 34 N. H. 439. "During the life of the husband, it is not settled by decisions, that we are aware of, how far the powers of the wife extends in giving away or disposing of her property. It would seem a reasonable rule that when the husband has failed to reduce the property to his possession, from inability as from its situation, or from want of time, no assent of the husband could be procured, and the wife would have no power to give away the property. But when the wife has continued to retain the control and management of her property by the assent of the husband, then her sale of the property *inter vivos* might be effectual. On this principle her *donatio causa mortis* might be good in such a case, unless the rules applicable to legacies should be held to apply. . . . But a *donatio causa mortis* is of the nature of a legacy. It becomes a valid gift only upon the decease of the donee. Now a married woman, by her husband's assent, may bequeath by will personal property in possession which belonged to her at her marriage, or which had fallen to her afterward: *Cutter v. Butler*, 5 Fost. (N. H.) 355. A general assent that a wife may make a will, is hardly sufficient. There must ordinarily be evidence of an assent to the particular will which is made by the wife. The assent may be proved by circumstances as well as by direct proof. Thus, if, after the wife's death, the husband suffer the will to be proved, and deliver the goods accordingly, the testament is good. If these principles are applicable, as we think they are, to the case of a *donatio causa mortis*, the husband in this case would be bound by the gift, by his wife, of the things which he saw divided:" *Jones v. Brown*, *supra*; *Russ v. George*, 45 N. H. 467; *Fettiplace v. Gorges*, 1 Ves. Jr. 46; S. C. 3 Bro. C. C. 8.

³ *Russ v. George*, 45 N. H. 467.

it is valid unless she can prove fraud, duress, or the like on his part.¹ To sustain such a gift the husband must produce cogent evidence of her intention to make it.² But if the law of the place where the gift is made gives a married woman the control over and right of disposal of her personal property, free from her husband's control—as many of the married woman's property acts do—then she may give away such property as freely as if she were a *feme sole*, and she may, no doubt, make of it a *donatio mortis causa*, for her husband's consent is not essential to its transfer or the validity of the gift.³ So she may, without his consent, even though no enabling statute is in force, make a valid gift, *mortis causa* even, of her separate personal property.⁴

¹ *Lynn v. Ashton*, 1 R. & M. 188; *Essex v. Atkins*, 14 Ves. 542; *Smyley v. Reese*, 53 Ala. 89; *Black v. Black*, 30 N. J. Eq. 215; *In re Jones*, 6 Biss. 68; *Lishey v. Lishey*, 2 Tenn. Ch. 5.

² *Rich v. Cockell*, 9 Ves. 369; *Rieper v. Rieper*, 79 Mo. 352; *Stiles v. Stiles*, 14 Mich. 72; *Witbeck v. Witbeck*, 25 Mich. 439; *Smith v. Osborn*, 33 Mich. 410; *Hooker v. Axford*, 33 Mich. 453; *Hoxie v. Price*, 31 Wis. 82.

³ *Kilby v. Godwin*, 2 Del. Ch. 61.

⁴ *Kilby v. Goodwin*, 2 Del. Ch. 61. That a married woman may make a gift of her property to her husband, see, also, *Durfee v. McClurg*, 6 Mich. 223; *Wales v. Newbould*, 9 Mich. 45; *Penniman v. Perce*, 9 Mich. 509; *Golding v. Golding*, 82 Ky. 51; *Farmer v. Farmer*, 39 N. J. Eq. 211; *Black v. Black*, 30 N. J. Eq. 215; *Stevens v. Stevens*, 2 Hun, 470; *Little v. Willetts*, 37 How. Pr. 481. He has the burden of showing a valid gift; and the fact that a deed of land was made to him, having been purchased with her money, in the absence of proof that it was so made by her direction, consent, or knowledge, is no evidence of a gift, and warrants no presumption against her interest: *Wales v. Newbould*, *supra*. Proof of mere use by the husband does not establish the gift: *White v. Zane*, 10 Mich. 333. But if she permit it to become so mingled with his that it cannot be distinguished, it is a relinquishment to him so far as his creditors are concerned: *Glover v. Alcott*, 11 Mich. 470; *Carew v. Mathews*, 49 Mich. 302; *Zinn v. Law*, 32 W. Va. 447. But a wife who contributes money for the purchase of land, and allows a deed for it to be taken in his name, she not insisting upon any agreement that the land was hers, will, after his death, be concluded from insisting that the land is her own: *Campbell v. Campbell*, 21 Mich. 438. But, see, *Leland v. Walker*, 23 Mich. 324, as to securities taken in his name. A wife who purchased furniture with her separate estate and puts it in the husband's possession made thereby a gift of it so far as his creditors were concerned: *Shirley v.*

56. WIFE AS DONEE OF THIRD PERSONS.—Previous to the enactment of the usual married woman's property acts, a wife could not take a gift from a donor who was not her husband unless the latter assented to it. Such a gift vested the title to the property in her husband by reason of his marital rights, and consequently he had the right to say whether he would be the recipient of a gift. So his consent was necessary, although the property was expressly given for the sole and separate use of the wife, independent of his control; but if so given such property was beyond his or her creditors' control.¹

57. FOREIGNER AS A DONEE.—In Louisiana, when the civil law was in force, it was decided that a resident and native of France could take a gift *mortis causa*, the laws of that country allowing an American to take such a gift

Shirley, 9 Paige Ch. 363, previous to the passage of an act enabling her to hold her property free from his right to reduce her property to his possession; but after the passage of such a law, such conduct on her part is not a gift: *Fitch v. Rathbun*, 61 N. Y. 579.

A husband who receives money belonging to his wife receives it as her agent, and upon the presumption thus raised she may recover it. If she expend it on his lands or for his use or benefit, without any agreement, it will be regarded a gift. If she expend it on his lands, independent of any agreement or promise, for the purpose of securing herself a home, and he drives her from his house, equity will give her relief; otherwise if she desert him: *Black v. Black*, 30 N. J. Eq. 215; *Grantham v. Grantham*, 34 S. C. 504.

A husband is entitled to his wife's service in the family: *Black v. Black*, *supra*. In some States she may make a conveyance of land directly to him: *Allen v. Hooper*, 50 Me. 371, but this cannot be done without an enabling statute: *Kinnaman v. Pyle*, 44 Ind. 275; *Luntz v. Greve*, 102 Ind. 173; *Hunt v. Johnson*, 44 N. Y. 27; S. C. 4 Am. Rep. 631. In Missouri a parol gift by a husband to his wife is void: *McGuire v. Allen*, 18 S. W. Rep. 282.

A husband on leaving the State executed a valid bill of sale for all his personal property; and his wife, for a valuable consideration, obtained possession of this bill of sale, whereupon he returned and took possession of the property. It was held that she had not given him the property described in the bill of sale: *Paul v. Jennings*, 23 Atl. Rep. 483.

¹ In *Matter of Grant*, 2 Story, 312; S. C. 5 L. Rep. 11; *Jarry v. Trust and Loan Co.*, 11 L. Can. Rep. 7.

from a native and inhabitant of France.¹ But in another case the court seems to have been of opinion that, even though a native of this country could not take a gift in a foreign country, yet a native and inhabitant of that country was not for that reason incapacitated from taking a gift in this country.² There is, however, nothing in the common law which prevents a foreigner from being a donee of personal property; but in nearly all countries where the common law prevails a foreigner cannot be the donee or grantee of real estate.

58. LEGISLATURE AS DONOR.—Unless restrained by the Constitution, the Legislature of a State may make a gift of the property of the State, either to an individual or to a corporation.³

59. SLAVE AS DONEE.—Under several laws of the Southern States, a slave could not be the donee of property, for the property of a slave belonged to his master;⁴ but this did not prevent him from receiving a gift of his own liberty.⁵

60. LUNATIC AS DONOR.—A lunatic can no more make a gift of his property than he can sell it; but just as he

¹ Succession of Mager, 12 Rob. 584.

² Duke of Richmond v. Milne, 17 La. 312.

³ Yosemite Stage, etc., Co. v. Dunn, 83 Cal. 264. The case involved the validity of a right of way through the Yosemite Valley Reservation. Pay for extra services performed by porters, pages, watchmen, and doorkeepers of a Legislature, rendered during a session of the Legislature, is a gift within the prohibition of the Constitution of California: Robinson v. Dunn, 77 Cal. 473. So the Legislature cannot make a gift to a person injured in the service of the State: Bourn v. Hart, 93 Cal. 321. But if services rendered a State are valid the court cannot hear evidence that an appropriation to pay for them was in fact a gift: Stevenson v. Colgan, 91 Cal. 649. What is not a gift in violation of the Constitution of South Dakota: see Cutting v. Taylor, 51 N. W. Rep. 949.

⁴ Valsain v. Cloutier, 3 La. 176; Cole v. Lucas, 2 La. Ann. 946; Lange v. Richoux, 6 La. 560; Blakely v. Tisdale, 14 Rich. Eq. 90.

⁵ Prudence v. Bermodi, 1 La. 240; Pauline v. Hubert, 14 La. Ann. 161; Maverick v. Stokes, 2 Bay (S. C.), 511.

may make a sale of it or will of it in a lucid interval, so he may make a gift of it; and the person attacking the validity of his gift upon the ground of his insanity has the burden of showing his incapacity to make the gift.¹

61. ONE OF TWO OR MORE DONEES INCAPABLE OF TAKING.—If one of two or more donees is incapable of taking the gift, the other takes the whole; and so, if land be given to a father and son and there be no son, it is said that the father takes it all.²

62. ADMINISTRATOR OR EXECUTOR OF DONOR.—The administrator or executor of a donor may take a gift from his decedent the same as any other person. In such an instance, however, he is called upon to make clear proof of the gift; for his possession is presumed to have been derived from his donor as his personal representative and not in his own right.³

63. DONOR'S GIFT TO HIS ILLEGITIMATE CHILDREN OR MISTRESS.—In some of the Southern States, statutes were enacted forbidding gifts, in whole or in part, from the donor to his mistress or to his illegitimate children. The construction usually placed upon these statutes was that the gifts were void only at the election of the donor's wife and legitimate children, and if they failed to avoid it the next of kin of the donor could not do so.⁴

64. DEAD PERSON—DONEE IN VENTRE SA MERE.—A gift cannot be made to a dead person, not even a

¹ *Hebert v. Winn*, 24 La. Ann. 385; *Vandor v. Roach*, 73 Cal. 614; *Bedell v. Carll*, 33 N. Y. 581. See Case IX, *Jenkins*, 108, 109.

² *Shelly's Case*, 1 Coke Rep., p. 101, citing 17 E. 3, fol. 29, ed. 18, E. I. 59.

³ *Estate of Corson*, 137 Pa. St. 160; *Estate of Stewart*, 137 Pa. St. 175.

⁴ *Ford v. McElray*, 1 Rich. Eq. 474; *Breithaupt v. Bauskett*, 1 Rich. Eq. 465; *Taylor v. McRa*, 3 Rich. Eq. 96; *King v. Johnson*, 2 Hill Ch. 624; *Hull v. Hull*, 2 Strobb. Eq. 174.

winding sheet for his body; for a dead person has no power to accept it.¹ Nor can one be made to an unborn infant.²

65. PRIVATE CORPORATION.—The funds and property of private corporations constitute a trust fund for the benefit of the stockholders, and any disposal of them in violation of that trust is illegal and may be avoided. Therefore, a gift of the funds of the corporation by the directors is a direct violation of the trust unless the charter of the corporation authorizes the disposition of such funds in that way.³ Nor can the directors condone a misapplication of the corporate funds;⁴ nor can a majority of the stockholders authorize a donation of the property of the corporation to another corporation, in which new corporation such majority of stockholders are also stockholders.⁵ So a stockholder may enjoin a railroad offering to donate its funds to an exhibition which it is claimed will increase the corporate receipts if established.⁶ So back pay, not agreed upon at the time he accepted the office, and which was not an inducement to his acceptance, cannot be given to an officer of a corporation.⁷ When-

¹ Hayne's Case, 12 Coke Rep. 113.

² Dupree v. Dupree, Busb. Eq. 164.

³ Frankfort Bank v. Johnson, 24 Me. 490; Wardens, etc., St. James' Church v. Rector, etc., 45 Barb. 356; Salem Bank v. Gloucester Bank, 17 Mass. 1; Jones v. Morrison, 31 Minn. 140; Minor v. Mechanics' Bank, 1 Pet. 46, 71.

⁴ Minor v. Mechanics' Bank, 1 Pet. 46, 71.

⁵ Polar Star Lodge v. Polar Star Lodge, 16 La. Ann. 53.

⁶ Tompkinson v. South, etc., Ry., 35 Ch. Div. 635. But see State Board of Agriculture v. Citizens' St. Ry., 47 Ind. 407, where such a subscription was enforced.

⁷ American, etc., Ry. Co. v. Miles, 52 Ill. 174; Merrick v. Peru Coal Co., 61 Ill. 472; Holland v. Lewiston, etc., Bank, 52 Me. 564; Bennett v. St. Louis, etc., Co., 19 Mo. App. 349; Barrill v. Calendar, etc., Co., 50 Hun. 257; Ogden v. Murray, 39 N. Y. 202; Blatchford v. Ross, 5 Abb. Pr. N. S. 434; Commonwealth Ins. Co. v. Crane, 6 Met. 64; Jones v. Morrison, 31 Minn. 140; Kilpatrick v. Penrose, etc., Co., 49 Pa. St. 118; Maux, etc., Co. v. Branegan, 40 Ind. 361; Smith v. Woodville, etc., Co., 66 Cal. 398; Holder v. Lafayette, etc., Ry. Co., 71 Ill. 106; Citizens' Nat. Bank v. Elliott, 55 Ia. 104; Loan Asso. v. Stonemetz, 29 Pa. St. 534;

ever an agent or officer of a corporation accepts a gift to unduly influence his action in corporate matters, the corporation is entitled to it or its proceeds and may maintain an action for that purpose.¹ So, if a corporation is formed for the purpose of purchasing a patent and using it in manufacturing articles or the like, and the promoters of such corporation elect their friends directors, and give them money or stock of the corporation in compensation therefor, the gift is void; and such directors must account for the money received, or, on winding up the company, pay for the stock at the highest figure it reached between the time when the gift was made and when the corporation is wound up.²

66. GIFT TO OFFICER OF CORPORATION TO UNDULY INFLUENCE HIS ACTION.—An officer of a corporation cannot secretly accept a gift the acceptance of which is conditioned upon his binding the corporation to do or not to do a particular thing. Such an action on his part is a betrayal of his trust; and he may be compelled to account to the corporation either for the gift or its value. Thus

Illinois Co. v. Hough, 91 Ill. 63; *Gridley v. Lafayette, etc., Ry. Co.*, 71 Ill. 200; *Hulton v. West, etc., Ry. Co.*, L. R. 23 Ch. Div. 654; *Northeastern Ry. Co. v. Jackson*, 19 W. R. 198; *New York, etc., Co. v. Ketchum*, 27 Conn. 170; *Lafayette, etc., Co. v. Cheeney*, 87 Ill. 446. But the grant of an annuity to a disabled clerk has been upheld: *Clarke v. Imperial, etc., Co.*, 4 B. & Ad. 315; so a gift to a deceased superintendent of a bank: *Henderson v. Bank*, 59 L. J. (Ch.) 794.

¹ *Tyrrell v. Bank of London*, 10 H. L. 26; *General Exchange Bank v. Horner*, 39 L. J. (Ch.) 393; *In re Stapleford*, 49 L. J. (Ch.) 253; *Boston, etc., Co. v. Ansell*, 59 L. J. Rep. 345; *Sheridan v. Sheridan, etc., Co.*, 38 Hun. 396; *Imperial, etc., Asso. v. Coleman*, L. R. 6 App. Cas. 189; *Bank of London v. Tyrrell*, 5 Jur. (N. S.) 924; *Jacobus v. Munn*, 37 N. J. Eq. 48.

² *Pearson's Case*, L. R. 5 Ch. Div. 336; 25 W. R. 618; affirming S. C. 4 Ch. Div. 222; *Metcalf's Case*, L. R. 13 Ch. Div. 169; *Leeke's Case*, L. R. 10 Ch. App. 469; *Ex parte Pelly*, L. R. 21 Ch. Div. 492; *De Ruvigne's Case*, L. R. 5 Ch. Div. 306; *Hay's Case*, L. R. 10 Ch. App. 593; *Oremerod's Case*, 25 W. R. 765; *McKay's Case*, L. R. 2 Ch. Div. 1; *Weston's Case*, L. R. 10 Ch. Div. 579; *Clarke's Case*, 37 L. J. (N. S.) 222.

if a director receives a commission from a person obtaining a loan from the corporation through the director's influence, the latter must account to the corporation for the amount thus received by him.¹ So where the director of a railway receives a bonus for the location of its road at a certain place.² So for bringing about a consolidation of two companies.³ So where a director of an insolvent corporation accepts a gift for secretly reinsuring the company's risks in a certain other insurance company.⁴ Nor can a corporation make a present to one of its retired officers, or even to one still serving it, for past services.⁵

67. CORPORATION AS DONEE.—A corporation may be a donee, having full power to accept any gift not foreign to the object of its incorporation;⁶ but it cannot claim the benefit of a gift made before it was incorporated where the donor die before its organization.⁷

68. MUNICIPAL CORPORATION AS DONOR.—A municipal corporation, unless expressly authorized by its charter or a statute, cannot make a donation of its property, money or bonds.⁸ Thus a borough council cannot use the corporate

¹ Farmers, etc., *Bank v. Downey*, 53 Cal. 466; *Imperial, etc., Assn. v. Coleman*, L. R. 6 H. L. 189.

² *Bestor v. Wathen*, 60 Ill. 133; *Linder v. Carpenter*, 62 Ill. 309; *Fuller v. Dame*, 18 Pick. 472; *Holladay v. Patterson*, 5 Oreg. 177.

³ *Gaskell v. Chambers*, 26 Beav. 360; *General Exchange Bank v. Horner*, 39 L. J. (Ch.) 393. But not so if all concerned assented: *Southall v. British, etc., Asso.*, L. R. 6 App. 614.

⁴ *Bent v. Priest*, 86 Mo. 475.

⁵ *Henderson v. Bank*, 40 Ch. Div. 170; S. C. 58 L. J. Ch. 197; 59 L. J. 856; 37 W. R. 332; *Ellis v. Ward*, 25 N. E. Rep. 530; *Beers v. New York Life Ins. Co.*, 20 N. Y. Supp. 788.

⁶ *Williams v. Western Star Lodge*, 38 La. Ann. 620; *De Camp v. Dobbins*, 31 N. J. Eq. 671; *Cruse v. Axtell*, 50 Ind. 49; *Baker v. Clark Inst.*, 110 Mass. 88; *Miller v. Chittenden*, 2 Ia. 315; *Vansant v. Roberts*, 3 Md. 119.

⁷ *Succession of Hardesty*, 22 La. Ann. 332.

⁸ *Bissell v. City of Kankakee*, 64 Ill. 249; *English v. People*, 96 Ill. 566; *Mather v. City of Ottawa*, 114 Ill. 659; *Tash v. Adams*, 10 Cush. 252; *Hood v. Lynn*, 1 Allen, 103; *Gerry v. Stoneham*, 1 Allen, 319.

funds for the purchase of a gold chain to present the retiring mayor.¹ So a municipal corporation cannot, without a statute authorizing it, make a donation of the corporate funds for the purpose of providing a Fourth of July celebration for the inhabitants of such municipality, even though such practice has been followed for years.² But a corporation, when authorized by statute, may donate money or bonds to hire volunteers in defense of the county against a rebellion to enable it to fill its quota of men under the calls of the President for troops, and thereby avoid an anticipated draft.³ It cannot make such a donation without a statute expressly authorizing it;⁴ but if it do its acts may be ratified by the Legislature and rendered legal.⁵

69. MUNICIPAL CORPORATIONS AS DONEE.—If there is no statute prohibiting it, a municipal corporation may take and accept a gift, whether made orally, by deed or by devise, the same as an individual.⁶ Thus a gift of money for repairing the highways of a town is valid;⁷ so

¹ *Attorney-General v. Batley*, 26 L. J. (N. S.) 392.

² *Hood v. Lynn*, 1 Allen, 103.

³ *Speer v. School Directors*, 50 Pa. St. 150; *Hilbish v. Catherman*, 64 Pa. St. 154; *State v. Richland Twp.*, 20 Ohio St. 362; *Thompson v. Pittson*, 59 Me. 545; *Broadhead v. Milwaukee*, 19 Wis. 624; *State v. Tappan*, 29 Wis. 664; S. C. 9 Am. Rep. 622; *Sperry v. Horr*, 32 Ia. 184; *Booth v. Woodbury*, 32 Conn. 118; *Shackford v. Newington*, 46 N. H. 415; *Lowell v. Oliver*, 8 Allen, 247; *Freeland v. Hastings*, 10 Allen, 570; *Comer v. Folsom*, 13 Minn. 219; *Dayton v. Rounds*, 27 Mich. 82; *Veagie v. China*, 50 Me. 518; *Clark Co. v. Lawrence*, 63 Ill. 32, 40; *Bowles v. Landaff*, 59 N. H. 164; *Gould v. Raymond*, 59 N. H. 260.

⁴ *Stetson v. Kempton*, 13 Mass. 272; *Fiske v. Hazzard*, 7 R. I. 438; *Shackford v. Newington*, 46 N. H. 415.

⁵ *Booth v. Woodbury*, 32 Conn. 118; *Kunkle v. Franklin*, 13 Minn. 127; *Comer v. Folsom*, 13 Minn. 219; *Hilbish v. Catherman*, 64 Pa. St. 154.

⁶ *Sargent v. Cornish*, 54 N. H. 18; *Chambers v. St. Louis*, 29 Mo. 543; *Town of Hamden v. Rice*, 24 Conn. 350; *Perin v. Carey*, 24 How. 465; *Worcester v. Eaton*, 13 Mass. 371; *Downing v. Marshall*, 23 N. Y. 366; *Sutton v. Cole*, 3 Pick. 232; *Fox's Will*, 52 N. Y. 530; S. C. 94 U. S. 315; *American Bible Society v. Marshall*, 15 Ohio St. 537.

⁷ *Town of Hamden v. Rice*, 24 Conn. 350.

for bridges ;¹ to build a town hall ;² of a sum of money, the income of which to be expended in the purchase of United States flags for display on all proper occasions ;³ for the maintenance of schools ;⁴ for the education of the poor ;⁵ for a school-house ;⁶ for a court-house and jail ;⁷ for a public common ;⁸ and for prospecting for and developing a coal mine near it.⁹

¹ *James v. Allen*, 3 Meriv. 16 ; *Kelley v. Kennard*, 60 N. H. 1.

² *Coggeshall v. Pelton*, 7 John. Ch. 292 ; *French v. Quincy*, 3 Allen, 9.

³ *Sargent v. Cornish*, 54 N. H. 18.

⁴ *Sutton, First Parish of, v. Cole*, 3 Pick. 232 ; *Dunbar v. Soule*, 129 Mass. 284.

⁵ *McDonogh Will Case*, 15 How. 367 ; *Le Couteaulx v. Buffalo*, 33 N. Y. 333.

⁶ *Castleton v. Langdon*, 19 Vt. 210.

⁷ *Jackson v. Pike*, 9 Cow. 69.

⁸ *State v. Atkinson*, 24 Vt. 448.

⁹ *Delaney v. Salina*, 34 Kan. 532. Inasmuch as a gift to a municipal corporation to be held in trust for a specified purpose is not, in fact, a gift to the corporation, we omit a discussion, referring the reader to Dillon's *Munc. Corp.*, sects. 566 to 574 (4th ed.). Such transactions are, in fact, contracts.

CHAPTER IV.

INTENTION AND PROMISE.

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| 70. Intent Essential to Validity of Gift. | 76. Gift Inter Vivos to Take Effect in the Future. |
| 71. Expression of Intent. | |
| 72. Mere Intention to Make a Gift. | 77. Gift of Property Not Yet Owned by Donor. |
| 73. Concealed Intention. | |
| 74. Promise to Make a Gift. | 78. Gift Inter Vivos to Take Effect After Death of Donor. |
| 75. Intention to Give Must be Clear | |
| —Proof. | |

70. INTENT ESSENTIAL TO VALIDITY OF GIFT.—An intention on the part of the donor to make the gift in question, and an intent on the part of the donee to accept as a gift, is essential to its validity.¹ If the donor had no intent to make a gift, or if the donee had no intention to accept the thing given as a gift, there is no gift executed ; for both the intent to give and an intent to accept are essentials to every gift. But if the donor has no intent to give, yet the donee, not aware of his intentions, and supposing the transaction is a gift, accepts it as such, the donor, if the donee, before aware of the actual intent of the donor, were to expend money and labor, or either, upon the thing given, might be estopped from claiming the transaction was not a gift, if he has been negligent in misleading the donee into the belief that the transaction was only a gift ; still if he had not been negligent in so misleading him, yet knowingly permitted him to labor under the belief that it was a gift, he would be estopped in reclaiming the thing given. For manifestly to allow the donee to expend money or labor upon the article he supposes to be a gift to him would be inequitable and

¹ See Sections 79, 82.

unjust; and a court of equity would not tolerate such conduct. Usually the intention to give is openly expressed by the donor. Most men desire full credit from the donee for the favor they have done him; and do not hesitate to inform him that they are then making him a gift. Such expressions of intention are always admissible as a part of the *res gestæ*.¹ And so, as has been elsewhere shown,² prior and subsequent declarations by the donor, showing his intentions are admissible in evidence when the validity of the gift is drawn in question. The intent, however, may follow the delivery; for, as has been shown,³ if the owner of a chattel deliver it to another, and afterward inform him that he may keep it as a gift, and it is so accepted by such other person, there is a good gift, although no intent to make a gift existed at the time of delivery.⁴

71. EXPRESSION OF INTENTION.—Loose expressions have been used with reference to the declaration by the donor of his intent to make the gift; and it is scarcely believed that the authors of them meant the full force of the meaning their language conveys. Thus it is common to say that “to constitute a gift, there must be an expression of intention to make a gift.”⁵ But it is believed that such is not the invariable rule, if it is meant thereby that there

¹ In *Matter of Ward*, 2 Redf. 251; *Booth v. Cornell*, 2 Redf. 261; *Fiero v. Fiero*, 5 T. & C. 151; *Reed v. Reed*, 52 N. Y. 651; *Bedell v. Carll*, 33 N. Y. 581; *Shuttleworth v. Winter*, 55 N. Y. 624; *Irish v. Nutting* 47 Barb. 370; *Stevens v. Stevens*, 2 Redf. 265; *Williams v. Guile*, 117 N. Y. 343. affirming 46 Hun, 645; *Hooper v. Goodwin*, 1 Wils. Ch. 212; S. C. 1 Swanst. 486.

² See Sections 222, 223, 224.

³ See Section 152.

⁴ See *Armitage v. Mace*, 14 J. & S. (N. Y.) 550. If the intent to give is doubtful, but consistent with any other theory, the gift is void: *Morse v. Meston*, 152 Mass. 5.

⁵ *Stevens v. Stevens*, 2 Redf. 265, 277; In *Matter of Ward*, 2 Redf. 251. See Section 236.

must be a verbal expression of an intent. The intention to give may be ascertained or may be made apparent or conveyed to the donee in other ways than by the use of verbal or written language. A look, accompanying the act of delivery, may be sufficient; or permitting the article to remain for a long time in the possession of the donee, accompanied by a failure to demand possession of it, may be sufficient when accompanied by other *indicia* of a gift. In all instances of alleged gifts the question of intention is one of fact for the jury, or the court when the jury is waived.¹ Thus in South Carolina, during the period of slavery, by a parent's merely putting his daughter, at her marriage, in possession of a slave, without reserving the right to reclaim it, or otherwise qualifying the possession, an intention to give was presumed.²

72. MERE INTENTION TO MAKE A GIFT.—While an intention, either secretly entertained or openly expressed, to make a gift, is essential to its validity, yet a mere intention is not of itself sufficient to make a valid gift.³ “A declaration of an intention to give is not a gift.”⁴ “To make a complete gift, there must not only be a clear intention, but the intention must be executed, and carried into effect.”⁵ In another case it was said: “The evidence establishes only a clear intention to relinquish; the testator meant to do a further act; he was preparing to do it; it was not done; the court cannot supply it.”⁶

¹ M'Cluney v. Lockhart, 4 McCord (S. C.), 251.

² Edings v. Whaley, 1 Rich. Eq. (S. C.) 301; Morisey v. Bunting, 1 Dev. L. (N. C.) 3.

³ Mahan v. Jane, 2 Bibb. 32 (intention expressed to free a slave); May v. May, 36 Ill. App. 77.

⁴ Northrop v. Hale, 73 Me. 66; Tomlinson v. Ellison, 104 Mo. 105; Duncombe v. Richards, 46 Mich. 166.

⁵ Cotteen v. Missing, 1 Madd. Ch. 103; Hooper v. Goodwin, 1 Swanst. 486.

⁶ Hooper v. Goodwin, 1 Swanst. 485; Parish v. Stone, 14 Pick. 198; Pope v. Burlington Savings Bank, 56 Vt. 284; S. C. 48 Amer. R. 781; Board, etc., v.

This rule applies both to a gift *inter vivos* and *mortis causa*.¹ In such instances, in order to perfect the gift, there must be a delivery by the donor to the donee, a renunciation, expressly or impliedly, by him of all dominion over the thing given, and an acceptance by the donee.² Nor does it make any difference in the rule if the intention is reduced to writing.³

73. CONCEALED INTENTION.—The donor's intention to make a gift must be in some way conveyed to the donee, so he may understandingly accept the thing tendered as a gift. If it is not made manifest to him, there is no gift. Thus, if A make a claim on B, and B delivers his promissory note to A, and by his words or acts induces A reasonably to understand that it is delivered in settlement of the claim, it is no defense to an action on the note that B secretly intended it as a gift.⁴

74. PROMISE TO MAKE A GIFT.—So a promise, unsupported by a valid consideration, to make a gift does not constitute a gift; nor can such a promise be enforced,⁵ even though the promise be made in writing, and the writing delivered to and accepted by the donee.⁶ This rule

Auditor-General, 68 Mich. 659; *Williamson v. Colcord*, 1 Hask. 620; *Hooper v. Goodwin*, 1 Wils. Ch. 212; S. C. 1 Swanst. 486; *Brownlee v. Fenwick*, 103 Mo. 420.

¹ *Egerton v. Egerton*, 2 C. E. Gr. 419.

² *Brink v. Gould*, 43 How. Pr. 289; *Jackson v. Twenty-third Street Ry. Co.*, 88 N. Y. 520; *Bedell v. Carl*, 33 N. Y. 581; *Nolen v. Harden*, 43 Ark. 307.

³ *Harmon v. James*, 7 Ind. 263; *Cotteen v. Missing*, 1 Madd. Ch. 103.

⁴ *Nye v. Chace*, 139 Mass. 379.

⁵ *Walker v. Crews*, 73 Ala. 412; *May v. May*, 36 Ill. App. 77; *Doty v. Willson*, 47 N. Y. 580; *Hunter v. Hunter*, 19 Barb. 631; *Williamson v. Colcord*, 1 Hask. 620; *Lee v. Luther*, 3 Woodb. & M. 519; *Williams v. Barton*, 13 La. 409; *Grice v. Pearson*, 7 La. Ann. 94; *Bush v. Decuir*, 11 La. Ann. 503.

⁶ *Mercer v. Mercer*, 29 Ia. 557; *Sanilac Co. v. Auditor-General*, 68 Mich. 659. A promise to a minor that if he would not drink, smoke, or play cards for money, or play billiards, until he is twenty-one years of age, he, the promisor, would

applies to a gift *mortis causa*,¹ even though death take effect so soon after the making of the promise as to prevent a delivery.² But where a husband and wife conveyed lands of the former to a third person, at the request of the latter, under a promise of the grantee to pay off certain liens on the premises, and then convey them to the wife; and the grantee paid off the liens, such payment was held to constitute an executed gift to the wife, and not a mere promise to make the gift.³ A promise to give may, however, be made valid by a devise of the thing given.⁴

75. INTENTION TO GIVE MUST BE CLEAR—PROOF.—In order to uphold a gift, especially one *mortis causa*, the intention to make it must be clearly shown—there must be “a clear intention to give.”⁵ Usually such intention is shown by proof of the donor’s declarations,⁶ which is treated at length elsewhere.⁷ So the relations of the donor and donee, their regard for each other, and expressions of like and dislike, love and aversion, may be proved to show the donor’s intent, on the one hand, or to rebut the claim that he had an intention to give, on the other.⁸

give a certain sum on that day, is only a promise to give and not binding: *Hamer v. Sidway*, 57 Hun. 229; *Keyl v. Westerhaus*, 42 Mo. App. 49.

¹ *Cox v. Hill*, 6 Md. 274, 284; *Fearing v. Jones*, 149 Mass. 12.

² *Hooper v. Goodwin*, 1 Wils. Ch. 212; S. C. 1 Swanst. 486.

³ *White v. Cannon*, 125 Ill. 412.

⁴ *Decker v. Waterman*, 67 Barb. 460. A loan of money at the highest rate of interest, made under the inducement of a promise by the borrower that he will make a valuable gift of personal property to the lender, is usurious: *Hendrickson v. Godsey*, 54 Ark. 155.

⁵ *Egerton v. Egerton*, 2 C. E. Gr. 419; *In Matter of Ward*, 2 Redf. 251; *Stevens v. Stevens*, 2 Redf. 265; *Green v. Carlill*, 4 Ch. Div. 882; S. C. 46 L. J. Ch. 477.

⁶ *Powell v. Olds*, 9 Ala. 861; *Olds v. Powell*, 7 Ala. 652.

⁷ See Sections 222, 223, 224.

⁸ *Conner v. Root*, 11 Colo. 183.

76. GIFT INTER VIVOS TAKES EFFECT IN THE FUTURE.—

A gift *inter vivos* to be valid must take effect at once,¹ and there must be nothing to be done essential to the validity;² for if it is to take effect in the future, there is no gift, but only a promise to give.³ So a gift to take effect at the death of the donor is void.⁴ Instructions by the donor to his agent or administrator to deliver up the property at a future date, or after his death, is also ineffectual to make a valid gift.⁵

77. GIFT OF PROPERTY NOT YET OWNED BY THE DONOR.—A donation of property not at the time owned by the donor is a nullity, for a gift can only be of present property.⁶ But a conditioned vendee may make a gift of the property purchased.⁷ So the owner of an animal may give it by deed to one person and its increase thereafter born to another.⁸

78. GIFT INTER VIVOS TO TAKE EFFECT AFTER DEATH OF DONOR.—A verbal gift to take effect after the death of the donor, unaccompanied by delivery, and not to be delivered nor to be the property of the donee until after

¹ *McFarlane v. Flinn*, 8 Nov. Sco. 162; *Smith v. Dorsey*, 38 Ind. 451; *Hynson v. Terry*, 1 Ark. 83; *Reed v. Spaulding*, 42 N. H. 114; *Payne v. Powell*, 5 Bush. 248; *Allen v. Polereczky*, 31 Me. 338.

² *Smith v. Dorsey*, 38 Ind. 451; *Kidder v. Kidder*, 33 Pa. St. 268.

³ *Spencer v. Vance*, 57 Mo. 427; *Bennett v. Cook*, 28 S. C. 353; *Vogel v. Gast*, 20 Mo. App. 104; *Roberts v. Draper*, 18 Bradw. 167; *Dole v. Lincoln*, 31 Me. 422; *Campbell's Estate*, 7 Pa. St. 100.

⁴ *Frost v. Frost*, 33 Vt. 639.

⁵ *Campbell's Estate*, 7 Pa. St. 100; *Kidder v. Kidder*, 33 Pa. St. 268; *Trough's Estate*, 75 Pa. St. 115; *Zimmerman v. Streeper*, 75 Pa. St. 147; S. C. 5 Leg. Gaz. 126.

⁶ *Soileau v. Rougeau*, 2 La. Ann. 766; *Rhodes v. Rhodes*, 10 La. 85.

⁷ *Hatch v. Lamos*, 65 N. H. 1.

⁸ *Banks v. Marksberry*, 3 Litt. 275 (a gift of a woman slave). Where a conditional vendee made a gift of land and then paid off the amount he owed thereon, the payment was held to be for the benefit of the donee, and could not be recovered back by his administrator: *Hatch v. Lamos*, 65 N. H. 1.

the donor's death, is void and cannot be enforced.¹ Yet if the gift is by deed and the deed is delivered to the donee, the gift will be valid;² but an instrument in writing, merely expressing an intention to make a gift at some time in the future during the lifetime of the donor, is ineffectual, and no rights can be acquired under it.³

¹ *Bonnafe v. Bonnafe*, Mann. (La.) 339; *Duncan v. Duncan*, 5 Litt. 12; *Knott v. Hogan*, 4 Met. (Ky.) 99.

² *Banks v. Marksberry*, 3 Litt. 275.

³ *Gammon Theological Seminary v. Robbins*, 128 Ind. 85.

CHAPTER V.

ACCEPTANCE.

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| 79. Acceptance Essential. | 85. Acceptance for Donee by Third Person. |
| 80. Acceptance Must be in Lifetime of Donor. | 86. Presumption of Acceptance by Adult. |
| 81. Acceptance Must be Before Revocation. | 87. Acceptance by Minor. |
| 82. Intelligent Acceptance. | 88. When Acceptance Not Presumed. |
| 83. When Acceptance Unnecessary. | 89. Terms of Acceptance. |
| 84. Acceptance of Donatio Mortis Causa. | 90. Evidence of Acceptance. |
| | 91. Effect of Disclaimer. |

79. ACCEPTANCE ESSENTIAL.—Like in a contract, there must be two persons to every gift; for an acceptance of the thing given is as essential as the acceptance of the terms of a proposed contract.¹ “To complete the investiture of title,” said the Maryland Court of Appeals, “there must be the mutual consent and concurrent will of both donor and donee, or trustee or guardian acting for the donee, in the acceptance of the gift.”²

80. ACCEPTANCE MUST BE IN LIFETIME OF DONOR.—The acceptance must be within the lifetime of the donor; it cannot be made after his death.³ But where the donee was handed a cloth pocket, such as ladies then habitually

¹ *Peirce v. Burroughs*, 58 N. H. 302; see Section 254; *Branch v. Dawson*, 36 Minn. 193.

² *Nickerson v. Nickerson*, 28 Md. 327; *Taylor v. Henry*, 48 Md. 550; S. C. 30 Am. Rep. 486; *Hitch v. Davis*, 3 Md. Ch. 266; *Thomas v. Thomas*, 107 Mo. 459; *Hunter v. Hunter*, 19 Barb. 631; *Thouvenin v. Rodrigues*, 24 Tex. 468; *Fuselier v. Masse*, 4 La. 423. There is no difference in the necessity for an acceptance at common law and the civil law; both require it: *De Levillain v. Evans*, 39 Cal. 120.

³ *Helfenstein's Est.*, 77 Pa. St. 328; *Phipps v. Jones*, 20 Pa. St. 260; *Love v. Francis*, 63 Mich. 181; *Eskridge v. Farrar*, 34 La. Ann. 709.

carried, by the donor, who said : " Here I give you this ; I make you a present of it ; I have another, and want you to wear them, they are so very handy," she being at the time in full health ; and three weeks after the donor died ; and the donee, on opening the pocket, found therein a pocketbook, which she knew was there, containing six shares of stock, which she did not know was there until she opened the pocketbook, it was held that there was a valid gift of the stock. But it must be observed of this case that the point was not made that there was no knowing acceptance of the stock until after the donor's death. The validity of the acceptance seems to have been undisputed, the real controversy having been whether the donor intended to give the stock.¹ A third person, however, may accept the gift as trustee for the donee, and it will be valid, although the latter does not know of it until after the donor's death.²

81. ACCEPTANCE MUST BE BEFORE REVOCATION.—The donee, or some one authorized to do so in his behalf, must accept the gift before it is revoked or recalled by the donor ; for until acceptance, the donor has full power to revoke the gift, although every other act has been performed that is essential to make a perfect gift.³

82. INTELLIGENT ACCEPTANCE.—Not only must there be an acceptance, but the acceptance must be made with an intelligent assent. The acceptance of the possession of the thing given is strong evidence of an acceptance of the gift, but it is not the same thing as an acceptance, no conclu-

¹ Allerton v. Lang, 10 Bosw. (N. Y.) 362.

² Tate v. Leithead, Kay, 658. See Standing v. Bowring, L. R. 31 Ch. Div. 282.

³ Love v. Francis, 63 Mich. 181. The statement of the text, however, is very doubtful in the light of Standing v. Bowring, L. R. 31 Ch. Div. 282. This subject is renewed under the Sections with respect to the time when the title to a gift passes.

sive evidence of it, especially if the gift is burdened with conditions requiring a performance of some act or the assumption of some obligation on the part of the donee.¹

83. WHEN ACCEPTANCE UNNECESSARY.—When, however, the acts of the donor are such as to raise a trust and make himself a trustee for the donee, an acceptance by the latter is not essential to the validity of the gift.²

84. ACCEPTANCE OF DONATIO MORTIS CAUSA.—In the case of a gift *mortis causa*, although the gift is revocable at any time before death, or so long as the donor possesses sufficient intelligence to understand his act, or by his subsequent recovery, yet the donee must accept the gift before the donor's death, or some one must accept it in his behalf.³

85. ACCEPTANCE FOR DONEE BY THIRD PERSONS.—The donee is not required to accept a gift in person; he may authorize an agent to accept it; or if an agent without authority accept it, he may afterward ratify it, even after the donor's death.⁴ But the mere fact that the acceptor is an agent of the donee does not render his acceptance valid; for he has no authority, from the mere fact of agency, to make a binding acceptance. Something more must be shown, either that he had authority to accept, or else his act was ratified by the donee before a revocation by the donor.⁵ But an infant cannot ratify the acts of an unauthorized agent or attorney. He cannot empower him to act for him; and therefore he cannot affirm what he has assumed to do for him in his name.⁶

¹ Higman v. Stewart, 38 Mich. 513; Armitage v. Widoe, 36 Mich. 124.

² Higman v. Stewart, 38 Mich. 513.

³ Darland v. Taylor, 52 Ia. 503.

⁴ Forbes v. Jason, 6 Bradw. 395.

⁵ Bush v. Decuir, 11 La. Ann. 503; Forbes v. Jason, 6 Bradw. 395; Hunter v. Hunter, 19 Barb. 631.

⁶ Armitage v. Widoe, 36 Mich. 124.

86. PRESUMPTION OF ACCEPTANCE BY ADULT.—If the gift is a benefit to the donee, courts will presume an acceptance by him, unless the facts proved show the contrary.¹ This rule rests upon another, which is that a person is presumed to do what it is his interest to do, and not to act against it.² Such is the case of a devise of an estate, where a disclaimer must be shown in order to defeat the devise;³ or a conveyance of property.⁴ So it is a general rule that all gifts are presumptively beneficial, and it is unnecessary to show that to be the case in order to raise the presumption of an acceptance.⁵ The law even goes so far as to raise a presumption that the donee had knowledge of the gift; especially is that the case where the donor exercised no authority over the gift after the act of donation is completed on his part.⁶ So where the gift consisted of the forgiving of a part of the debt, by an indorsement on the note and mortgage a receipt of payment of the part given, it was presumed that the donee had accepted the gift, and evidence of acceptance deemed unnecessary.⁷ So where the holder of a note executed by her grandson, destroyed it, and afterward stated that she expected to live but a short time and in the event of her death she did not desire him to be obliged to pay it, it was held that such acts constituted a completed and

¹ *Gnard v. Bradley*, 7 Ind. 600; *Stewart v. Weed*, 11 Ind. 92; *Goss v. Singleton*, 2 Head. 67.

² *Creps v. Baird*, 3 Ohio St. 277; *Clawson v. Eichbaum*, 2 Grant. Cas. 130; *Higman v. Stewart*, 38 Mich. 513.

³ *Townson v. Tickell*, 3 B. & Ald. 31; *Thompson & Leach's Case*, 2 Salk. 618.

⁴ *Bensley v. Atwill*, 12 Cal. 231; *Lady Superier v. McNamara*, 3 Barb. Ch. 375; S. C. 49 Am. Dec. 184; *Peavey v. Tilton*, 18 N. H. 151; S. C. 45 Am. Dec. 365; *Merrills v. Swift*, 18 Conn. 257; S. C. 46 Am. Dec. 315; *Mallory v. Stodder*, 6 Ala. 801; *Mitchell v. Ryan*, 3 Ohio St. 377; *Barns v. Hatch*, 3 N. H. 304; *Renfor v. Harrison*, 10 Mo. 411.

⁵ *Goss v. Singleton*, 2 Head. 67; *Child v. Child*, 5 N. Y. Wkly. Dig. 16; *De Levillain v. Evans*, 39 Cal. 120.

⁶ *Howard v. Savings Bank*, 40 Vt. 597.

⁷ *Green v. Langdon*, 28 Mich. 221.

valid gift to the grandson, *mortis causa*, of the amount of the note, and his acceptance would be presumed.¹

87. ACCEPTANCE BY MINOR.—In the case of a gift to a minor the law does not presume an acceptance so readily as if he were an adult. If it is made to appear that the gift is for his advantage, the law accepts it for him and will hold the donor bound; but if it is not for his advantage, the law will repudiate it at his instance, even though he may in terms have accepted it.² No formal acceptance on the part of the minor is necessary; and the gift is a good one even though the minor has no knowledge of it.³

88. WHEN ACCEPTANCE NOT PRESUMED.—But there are many instances in which the presumption of an acceptance of a gift will not be presumed. These are where the acceptance imposes a burden upon the donee, or will work him an injury, and it may be said that they are instances of contracts rather than of gifts. This is especially true of gifts to infants. Thus to an infant was executed a contract for the purchase of a tract of land at the price of \$13,000, and upon which only \$400 had been paid, it was held that there was no presumption of an acceptance; and it was said that the same rule would prevail if the donee were an adult; for an acceptance involved the assuming of an obligation to pay large sums of money,

¹ Darland v. Taylor, 52 Ia. 503.

² Section 254. DeLevillian v. Evans, 39 Cal. 120; Donner v. Palmer, 31 Cal. 500; Dow v. Gould & Curry Silver Mining Co., 31 Cal. 629.

³ Pruitt v. Pruitt, 91 Ind. 595; Rinker v. Rinker, 20 Ind. 185; Wyble v. McPheters, 52 Ind. 393; Baker v. Williams, 34 Ind. 547; Williams v. Walton, 8 Yerg. 387; S. C. 29 Am. Dec. 122; Minor v. Rogers, 40 Conn. 512; S. C. 16 Am. Rep. 69; Keington v. Rautigam, 43 Conn. 17; Gardner v. Merritt, 32 Md. 78; Howard v. Copley, 10 La. Ann. 504; Judd v. Esty, 6 Low. Can. 12. The Spanish law is the same: Pierce v. Grays, 5 Mart. (La.) 370; Fnselier v. Masse, 4 La. 423; Duplessis v. Kennedy, 6 La. 231 (in this case it was held that a minor might accept, although he had a guardian).

and there could be no presumption that any one would voluntarily assume such a burden.¹ But where a mother conveyed a tract of land to her five-year-old son, upon the express condition that he pay to his brother or the other donee on his arriving at full age, \$300, the court held that a presumption of acceptance was raised by the mere proof of the gift. The value of the land given, however, does not appear.²

89. TERMS OF ACCEPTANCE.—The gift, to be valid, must be accepted by the donee upon the exact terms in which it is tendered. If it is an absolute and unconditional gift, the acceptance must be absolute and unconditional, or the donor must agree to the modification of the terms made by the donee; if the gift is conditional, then the donee must accept and become bound by the terms of the condition. In these respects there is no difference between a gift and a contract.³

90. EVIDENCE OF ACCEPTANCE.—An acceptance may be shown by the language used by the donee, by his taking the instrument given or tendered into his possession; or, if the delivery is to a third person, by his subsequent demand for its possession, or efforts to obtain possession, even after the gift has come into the hands of the donor's personal representatives.⁴ So the production of a bond, alleged to have been given, by the donee in court, when suit has been instituted upon it by him,⁵ or the commencement of a suit concerning the thing given,⁶ or a claim to the right to hold possession of the thing given, is sufficient

¹ *Armitage v. Widoe*, 36 Mich. 124; *Ezell v. Giles Co.*, 3 Head. 583.

² *Pruitt v. Pruitt*, 91 Ind. 595.

³ *Armitage v. Widoe*, 36 Mich. 124.

⁴ *Hunter v. Hunter*, 19 Barb. 631.

⁵ *McLean v. State*, 8 Heisk. 22.

⁶ *Mallett v. Page*, 8 Ind. 364.

evidence of an acceptance.¹ In Canada the registration of the deed of gift, by the donee, is an acceptance of the gift.²

91. EFFECT OF DISCLAIMER.—A disclaimer operates as evidence that an acceptance was never made; and if an acceptance was never made, the property remains in the donor. This is even true of a gift in trust for a third person. The law does not force the donee to accept the gift, whether made in trust or otherwise; and it is therefore competent for the person appointed trustee to refuse both the gift and the office attached to it, before he has done any act to deprive himself of the right to make the disclaimer or refusal. If the gift is of an estate, by will or by deed, there is some conflict of authority whether the disclaimer may be by deed or parol; but there is no doubt that the renunciation may be by deed, by matter of record, or by any written instrument, or by an answer in court, especially in chancery.³ The effect of the refusal or disclaimer is that the trust will relate back, and be held to have been made at the time of the gift, if no act has been done to preclude the party; and all parties are placed precisely in the same situation relative to the trust property as if the disclaiming party had not been named in the trust instrument; and if a devise in trust is disclaimed by the trustee, the legal title will vest in the heirs of the devisor. But in such an instance the donee may apply to a court of chancery to have a trustee appointed; and the effect of the appointment is to divest the heir, who, by the former renunciation, has become a *cestui que trust* of the legal estate.⁴

¹ *Thouvenin v. Redrigues*, 24 Tex. 468; *Poirier v. Lacroix*, 6 Low. Can. Jur. 302.

² *Charlebois v. Cahill*, 20 Low. Can. Jur. 27; *Judd v. Esty*, 6 Low. Can. Rep. 12; *Dupuis v. Cedillot*, 10 Low. Can. Jur. 338.

³ *Tharpe v. Dunlap*, 4 Heisk. 674.

⁴ *Goss v. Singleton*, 2 Head. 67.

CHAPTER VI.

CONDITIONAL GIFT.

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| 92. Parol Condition—Contingent Gift. | 96. Gift Over if Donee Die Without Heirs. |
| 93. Reservation of Right to Use Gift in Certain Contingency. | 97. Donatio Mortis Causa. |
| 94. Gift Conditioned to Pay Part of it to Third Person. | 98. Gift Conditioned on Marriage. |
| 95. Gift Conditioned that Donee have Children Born. | 99. Donee Takes Gift With Condition Annexed—Estoppel. |
| | 100. Performance of Condition. |

92. PAROL CONDITION—CONTINGENT GIFT.—There can be usually no condition or limitation to a parol gift;¹ such a gift is void, and not the condition. For by annexing a condition to the gift there is no gift *in præ-senti*, and the donor may revoke it. The gift is not absolute. But suppose the gift is made, conditioned to take effect upon the donee performing the condition. If the donor delivers the thing given to the donee, and the latter performs the condition, although the gift is a parol one, yet upon performance the gift becomes a vested one and is irrevocable. Thus a husband said to a wife, "if you like to learn upon it, I will give you this piano." She learned to play upon it, and at his death, although the piano remained in their common residence, it was held that she was entitled to the instrument.² Suppose, however, the condition is not that the donee shall do something specified (and the performance of such a condition usually turns the gift into a contract, or rather the transaction is a contract), but that the gift shall become vested on the happening of a certain event over which neither

¹ Hynson v. Terry, 1 Ark. 83; Fitzhugh v. Beale, 4 Munf. 186.

² Whittaker v. Whittaker, 21 L. R. Ch. Div. 657; S. C. 51 L. J. Ch. Div. 737; 46 L. T. (N. S.) 802; 30 W. R. 787.

the donor nor the donee have any control. If the transaction is simply a promise to make a gift on the happening of such an event, it is very clear that there is no valid gift—only a promise to make one; but if the thing is handed over to the donee by the donor, conditioned to become vested on the happening of such event, then the happening of the event, accompanied by the donor's acquiescence in the donee's retention of the possession of the article given, will justify the court in holding or the jury in finding that the gift had become perfected and the title to the property vested in the donee; and there is no reason why the gift should not be deemed perfected as soon as the event has happened, although, up to that time, the donor could revoke it; yet the cases seem to be against this suggestion.¹ But where some time has elapsed between the occurrence of the event upon which the gift is made contingent and the controversy over the validity of the transaction as a gift, the court or jury, where the donor has taken no steps to annul or revoke the gift, nor expressed or made manifest any intention to recall it, is justified in reaching the conclusion that he has ratified all that preceded the controversy, and thus confirmed the gift. Of course, if he had by word of mouth or written language confirmed it, there could be no controversy over its validity. But a marked distinction is apparent between a gift conditioned that if a certain event happened the donor might recover the property, or rather that it should revert to him or the gift be deemed annulled and a conditional gift. Such a transaction is not a gift.²

¹ *Smith v. Dorsey*, 38 Ind. 451; *Irish v. Nutting*, 47 Barb. 370; *Bedell v. Carll*, 33 N. Y. 581; *Dexheimer v. Gautier*, 34 How. Pr. 472.

² *Smith v. Dorsey*, 38 Ind. 451. Where the evidence showed that the donor told the donee, after the delivery to the latter of certain coupons for collection and on the eve of the former's departure for a distant city, to take the coupons and remit the proceeds to the donor as they became due if the donor lived, but if he never came back, to keep them in part payment of services already ren-

93. RESERVATION OF RIGHT TO USE GIFT IN A CERTAIN CONTINGENCY.—A reservation of the right to use the thing given upon the happening of a certain condition does not invalidate the gift. Thus the owner of a slave gave him upon the condition subsequent that she should have the right to borrow him if she should again take up housekeeping, or to receive something like hire if she should stand in need of his work; and this was held not to avoid the gift. “It imposed,” said the court, “on the donee an obligation which the donee was bound to fulfill; and the subsequent payment of hire, so far from avoiding the gift, was the performance of the condition, upon which it was made, and operated to perfect it, if any thing was wanting.”¹ So where a creditor took the obligation of his debtor, payable to himself upon the condition that he call for it before his decease, and if he did not so call, then payment thereof to be made to a third person, it was held that this was a valid gift, it appearing that the creditor adopted this method to secure himself if he should need any part of the fund for his personal use.²

94. GIFT CONDITIONED TO PAY PART OF IT TO THIRD PERSONS.—If A make a gift to B of a certain sum of money, upon the condition that B pay a part of the money to C, the remaining part in B's hands is still a gift; the transaction is not a contract. So if A give B notes he holds on third persons, upon condition that B collect them and pay a part thereof to C, whom A owed, the transaction is still a gift as between A and B,³ though

dered by the donee to the donor; it was held that the jury were warranted in finding a present conditional gift to the donee, which would confer upon him a good title to such coupons as were not due at the donor's death: *Tyndale v. Randall*, 154 Mass. 103.

¹ *M'Kane v. Bonner*, 1 Bail. L. S. C. 113.

² *Blanchard v. Sheldon*. 43 Vt. 512.

³ *Riegel v. Wooley*, 81* Pa. St. 227. A right reserved in the deed of gift to designate a beneficiary is valid: *Lines v. Lines*, 142 Pa. St. 149.

no doubt it is a contract between B and C, especially after B has collected the money due on the note, or enough to pay C in whole or in part; and equally so a contract between A and B after the latter has collected the money.¹ So where A gave lottery tickets to her servants, on condition if any of them drew a prize of £20 or more, they should give one-half to her daughter; and the ticket given to the foot-boy drew a prize of £1,000; on a bill by the daughter, a moiety of the £1,000 was decreed to her.²

95. GIFT CONDITIONED THAT DONEE HAVE CHILDREN BORN.—A parol gift, however, upon the condition that the donee have children born to him thereafter is valid; but if it is a gift that shall be transmitted to the donee's descendants, as long as there shall be such, and to secure a return of the gift to the donor upon a failure of descendants, whenever the event shall occur, then the gift is void.³

96. GIFT OVER IF DONEE "DIE WITHOUT HEIRS."—A gift to A, even by deed, of a chattel upon condition that if he "die without heirs" the property shall go to B, is void; for the gift is an entire disposition of the chattel, and the limitation over, being to take effect after such disposition, is void.⁴ Referring to the two cases cited, the same court explained them by saying: "There are

¹ *Swihart v. Shaum*, 24 Ohio St. 432.

² *Scot v. Haughton*, 2 Vern. 560. A sum of money paid by A to B, for the purpose of purchasing C a promotion in the army, remained unapplied in the hands of B at the death of A. C having been compelled by his bad health to quit the army, and having no prospect of being able to enter into the service again, it was decreed that the money be paid to C: *Leche v. Kilmorey*, Turn. & Russ. 207. See *Morris v. MacCulloch*, 2 Eden, 190; *S. C. Ambl.* 432. A suggestion that money be deposited in a certain way is advisory and not a condition or limitation of the gift: *Frazier v. Perkins*, 62 N. H. 69.

³ *Halbert v. Halbert*, 21 Mo. 277.

⁴ *Wilson v. Cockrill*, 8 Mo. 1; *Vaughn v. Guy*, 17 Mo. 429.

two grounds upon which these decisions may be placed: one, that the limitation over, being upon a dying without issue, which has been construed to mean an indefinite failure of issue—a want of descendants at any time, sooner or later, whenever it should occur, and not a want of them at the death of the first taker, or at any other definite point of time—the effect of it, if applied to real property, would have been to create an estate tail by necessary implication; and, therefore, being here applied to personalty, carried the whole interest, according to the rule that terms, which, if applied to real property, would give an estate tail, passes the absolute interest in personal property, and left nothing in the grantor upon which the limitations over could take effect:¹ and, second, that, although such future interests in chattels, if limited to spring up within a proper period of time, so as not to violate the rules against perpetuities, are valid at law, when created by will, as executory bequests, and good in equity as equitable estates through declarations of trust, yet they are not allowed at common law in the disposition of personal chattels by conveyances *inter vivos*.”²

97. DONATIO MORTIS CAUSA.—But conditions are not confined to gifts *inter vivos*; a gift *causa mortis* may be conditional. Thus, where A gave B money, with directions that, if he died from his then sickness, to keep it and give it to C if he lived to be of age, and, if he did not, to divide it between D and E, it was held that this was a valid gift.³ But it should be observed of this that it really was not a conditional gift; it was an absolute gift, with the ultimate donee conditional.

¹ Citing *Anderson v. Jackson*, 16 Johns. 381.

² *Halbert v. Halbert*, 21 Mo. 277.

³ *Clough v. Clough*, 117 Mass. 83; *Turner v. Boston Five Cents Savings Bank*, 129 Mass. 425; S. C. 37 Am. Rep. 371.

98. GIFT ON CONDITION OF MARRIAGE.—If a person making his addresses in view of marriage, on reasonable expectation of success gives presents, and the lady deceive him afterward, the presents must be returned, or the value of them paid; but where made to introduce a person only to a woman's acquaintance, he is looked upon in the light of an adventurer, and, if he lose by the attempt, must take it for his pains, especially where there is a disproportion between the lady's fortune and his own.¹

99. DONEE TAKES GIFT WITH CONDITION ANNEXED—ESTOPPEL.—A donee, if he takes the gift, must take it with the condition annexed; and although he is ignorant of the condition thereto annexed. So where the delivery is to an agent of the donor with instructions to deliver it over to the donee on the happening of a certain event, and the agent delivers it in violation of his instructions, the gift is void in the donee's hands; but if the donee, in the belief that his title is good, change his situation and expend money or the like thereon, then the donor, by his failure to repudiate the act of his agent, will be liable, like a grantor for value, to the application of the doctrine of equitable estoppel.²

100. PERFORMANCE OF CONDITION.—A gift made upon the express condition that the donee perform some act, imposes upon him the duty of performing it, if he desire to avail himself of the gift; and when the condition is performed, it becomes vested—in fact, it becomes a contract.³ The person purchasing the gift from the do-

¹ Robinson v. Cumming, 2 Atk. 409. See Section 117.

² Berry v. Berry, 31 Ia. 415. The maxim *Ceius est dare, ejus est disponere*, applies to gifts to which a condition is annexed: *In re Stevens*, 83 Cal. 322.

³ Conkling v. Springfield, 39 Ill. 98; *De Pontalba v. New Orleans*, 3 La. Ann. 660; *Duclaud v. Rousseau*, 2 La. Ann. 168; *Fraser v. Dupres*, 15 Low. Can. Jur. 111; *Berry v. Berry*, 31 Ia. 415.

nee, with notice of the unperformed condition, must perform it or lose his property.¹ The donor may, however, waive the condition; and such waiver may be evidenced only by conduct. Thus where the owner of property gave it away on the condition that the donee support the donor, a failure on the part of the latter to demand support was held to be a waiver of all right to demand that all arrears be made up.²

¹ *Lalonde v. St. Denis*, 3 Leg. News, 415.

² *McGinn v. Brawders*, 1 Low. Can. Jur. 176; *Chenier v. Coutlee*, 7 Low. Can. Jur. 291. Conditions against alienation, see *Cheval v. Morrin*, 6 Low. Can. Jur. 229; *Volois v. Gareau*, 2 Rev. Leg. 131. Conditioned to use ground for church edifice; removal of edifice to another tract: *Kilpatrick v. Graves*, 51 Miss. 432.

CHAPTER VII.

CHANGING GIFT TO CONTRACT.

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| 101. Gift Cannot be Changed to a Charge. | 103. Gift Changed to a Trust. |
| 102. Power to Sell Not Convertible into Power to Give. | 104. Gift Changed to An Advancement. |

101. GIFT CANNOT BE CHANGED TO A CHARGE.—A gift, being an executed contract, cannot be changed to a contract unless both donor and donee agree to the change. It would be manifestly unfair to allow a person to make a gift, and after the thing given was accepted, to change it to a charge and thus compel the donee to pay for something he possibly never would have purchased. Nor would there be a consideration in such an event to bind the donee; for he would simply be purchasing his own goods. The agreement would be a *nudum pactum*. The best illustration of an attempt to change a gift to a charge is the case of charging one, who has been a member of a family, for his support. Thus where an infant is taken and brought up as a member of a family, without any apparent claim or expectation, until afterward, of an allowance from the infant's estate for such support, a claim therefor cannot be successfully maintained against his estate.¹ What was originally intended as a gratuity cannot be subsequently changed into a charge.² A very familiar instance of this kind is where a member of a family renders services because of his connection with it. In all such instances the services are gratuitous and cannot

¹ Folger v. Heidel, 60 Mo. 284.

² Allen v. Richmond College, 41 Mo. 302; Whipple v. Dow, 2 Mass. 418; Mahan v. United States, 16 Wall. 143; S. C. 8 Ct. of Cl. 137.

be turned into a claim or charge.¹ So if the work is done as a donation it cannot be changed to a charge.² And as between relations the presumption of a contract to pay for services will not ordinarily arise.³ So where one as a neighbor and relative undertook to manage the moneyed affairs of an old lady, without any stipulation as to compensation, and without intending to make a charge, it was held that he could not charge her estate after her death for his services;⁴ and the same rule applies to one serving a stranger.⁵

102. POWER TO SELL NOT CONVERTIBLE INTO POWER TO GIVE.—It is self-evident that a power given to sell does not authorize a gift of the thing to be sold, for such powers are construed strictly and must be strictly followed.⁶ So a power to give cannot be considered as authorizing a sale, although the courts would undoubtedly look with more leniency upon the last transaction than on the former.

103. GIFT CHANGED TO A TRUST.—A gift once perfected cannot be changed by the donor, without the consent of the donee, into a trust; nor can a trust, without the consent of the beneficiary, be changed by the grantor into a gift.⁷

¹ *Harris v. Currier*, 44 Vt. 468; *Taylor v. Taylor*, 1 Lea, 83; *Bartholomew v. Jackson*, 20 Johns. 28; *Force v. Haines*, 2 Harr. (N. J.) 385. See Article in 20 Cent. L. Jour., p. 326.

² *Wells v. Caldwell*, 9 Humph. 609; *White v. Jones*, 14 La. Ann. 681; *Little v. Dawson*, 4 Dall. 111; *Davison v. Davison*, 2 Beas. (N. J.) 246.

³ *Taylor v. Taylor*, 1 Lea, 83; *Harris v. Currier*, 44 Vt. 468; *Hays v. McConnell*, 42 Ind. 285; *Hertzog v. Hertzog*, 29 Pa. St. 465.

⁴ *Hill v. Williams*, 6 Jones Eq. 242.

⁵ *Vestry, etc. v. Barksdale*, 1 Strobb. Eq. 197.

⁶ *Dupont v. Wertheman*, 10 Cal. 354. See *Selleck v. Selleck*, 107 Ill. 389.

⁷ *Lemon v. Wright*, 31 Geo. 317. See *Marcy v. Amazeen*, 61 N. H. 131, 134.

104. GIFT CHANGED TO AN ADVANCEMENT.—An absolute gift to a child of the donor may be changed into an advancement, with the consent of the donee, and no consideration for the change is essential; and an advancement may be changed, by consent, into an absolute gift, and it is not necessary that it should be done by will.¹ If a parent convey property to his child as an advancement and then turn it into a gift, he may not turn it back into an advancement without the child's consent.²

¹ *Wallace v. Owen*, 71 Geo. 544; *Harper v. Parks*, 63 Geo. 705.

² *Sherwood v. Smith*, 23 Conn. 516; *Meeker v. Meeker*, 16 Conn. 383. The mere declaration of the parent or child cannot change an advancement to a gift: *Sweet v. Northrup*, 12 Wk. Dig. 377. See "Advancements."

CHAPTER VIII.

REVOCATION.

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| 105. Donor Cannot Revoke a Gift Inter Vivos. | 117. Wedding Presents, Intended Marriage Broken Off. |
| 106. Revocation of Incomplete Gift. | 118. Unintended Gift—Mistake. |
| 107. Minor May Revoke—Creditors. | 119. Immorality Does Not Revoke. |
| 108. Gift for Benefit of Third Person. | 120. Change of Position by Donee in View of Gift—Acquiescence. |
| 109. Estoppel to Deny. | 121. Gift of Real Estate by Parol. |
| 110. Revocation of Trust. | 122. Redelivery. |
| 111. Reservation of Right to Revoke Gift. | 123. Donatio Mortis Causa. |
| 112. Deed of Gift Mortis Causa Cancelled. | 124. Burden to Show Non-Revocation in a Voluntary Deed of Settlement. |
| 113. Fraud or Undue Influence. | 125. Revocation Under Spanish and Mexican Laws. |
| 114. Revocation of Conditional Gift. | 126. Revocation by Birth of Child. |
| 115. Delivery in Escrow. | 127. Civil and French Law. |
| 116. Revocation by Death. | |

105. DONOR CANNOT REVOKE A GIFT INTER VIVOS.—Since a perfected gift is an executed contract in the law, it can no more be revoked by the donor without the consent of the donee than if there was a valuable consideration moving from the latter to the former; but the gift must be a perfected one—one to which nothing more is essential to pass the title to the donee. “It has been held too often to admit of doubt or discussion,” said the Kentucky Court of Appeals, “that an executed gift or gratuity cannot be revoked by the donor, no matter what may have been the condition of the donee, or what charities he shall receive, or property acquire in the future, unless the donation or gratuity were the result of fraud or mistake in its execution. And there is no reason why an executed gift of personal property shall not be revoked that does not sustain the irrevocability of gratuitous labor, care,

board, or education after completion. One is no more the executed donation of value than the other, and the same principle of law is equally applicable to both." Consequently, where an institution, organized to care for and maintain orphan children until their maturity, took a child to rear it, and after the child had fully entered the institution it drew a pension from the government by reason of the fact that its father had been a soldier in the army, it was held that the institution could not revoke its acceptance of the child and that it was not entitled to the pension money.¹ So, where a father bid off property at an administrator's sale in his own name, paid for it with his own money, and had the deed made in his own and his child's name, it was held that he could not in after years revoke the gift.² In another case, speaking of a gift *inter vivos*, it was said: "It seems to be agreed on all hands that it is essential to every gift of this class that it should be irrevocable by the donor;" and there are many cases to this effect.³ The gift cannot be invalidated. If a gift for any reason is void, as, for instance, because of the disabilities of the donor or donee

¹ *St. Joseph's Orphan Society v. Wolpert*, 80 Ky. 86; S. C. 3 Ky. L. Rep. 573.

² *Eckert v. Gridley*, 104 Ill. 306; *White v. Cannon*, 125 Ill. 412.

³ *Knott v. Hogan*, 4 Met. (Ky.) 99; *Duncan v. Duncan*, 5 Lit. 12; *Walden v. Dixon*, 5 T. B. Mon. 170; *Brown v. Brown*, 4 B. Mon. 535; *Gault v. Trumbo*, 17 B. Mon. 682; *McCloskey v. McCloskey*, 29 La. Ann. 237; *Dresser v. Dresser*, 46 Me. 48; *Gardner v. Merritt*, 32 Md. 78; *Allen v. Polereczky*, 31 Me. 338; *Smith v. Dorsey*, 38 Ind. 451; *Esswein v. Seigling*, 2 Hill Ch. (S. C.) 600; *Hall v. Howard*, Rice (S. C.), 310; *Trowell v. Carraway*, 10 Heisk. 104; *Woodson v. Pearce*, 5 Sneed, 415; *Sheegog v. Perkins*, 4 Baxt. 273; *Henry v. Groves*, 16 Gratt. 214; *Mayo v. Carrington*, 19 Gratt. 74; *Kellogg v. Adams*, 51 Wis. 138; *Gallaudet's Case*, 9 Ct. of Cl. 210; *Whiting v. Barrett*, 7 Lans. 106; *Matthews v. Rentz*, 2 Amer. L. Rec. 371; *Greenfield's Estate*, 14 Pa. St. 489; *Harris v. Clark*, 2 Barb. 94; affirmed, 3 N. Y. 93; *Welsch v. Belleville Savings Bank*, 94 Ill. 191; *Stone v. Hackett*, 12 Gray, 227; *Ryburn v. Pryor*, 14 Ark. 505; *Garner v. Graves*, 54 Ind. 188; *Raymond v. Pritchard*, 24 Ind. 318; *Easley v. Dye*, 14 Ala. 158; *Lafleur v. Girard*, 2 Low. Can. Jur. 90; *Pope v. Randolph*, 13 Ala. 214; *Smith v. Smith*, 7 C. & P. 401. If the gift is by deed, the donor cannot revoke it by securing possession of and destroying the deed: *Watts v. Starr*, 86 Geo. 392.

to make and receive a gift, it may be revoked by the donor.¹ So a father may not revoke a gift made to his minor son unless the latter consent;² nor can a donor revoke a gift by a subsequent devise of the thing given,³ nor revoke it in his will.⁴ Even a voluntary settlement cannot be revoked.⁵

106. REVOCATION OF INCOMPLETED GIFT.—So long, however, as the gift remains incompleted—so long as something remains to be done, either by the donor or donee, to complete the transaction—the donor may revoke the gift. A very familiar instance is where there has been no delivery of the thing given; in all such instances there may be a revocation.⁶ Even if the gift is made to a minor, the donor, before it is completed, may revoke it.⁷ Where the payee of a note placed it in the

¹ *Manny v. Rixford*, 44 Ill. 129.

² *Smith v. Smith*, 7 C. & P. 401. But can a minor consent to the revocation of a gift? As it is an executed contract, it would seem not. The gift in controversy in this case was a watch; and possibly an article of wearing apparel stands on a different footing from other property.

³ *Mahan v. Jane*, 2 Bibb. 32; *Jenkins v. Jenkins*, 1 Mill (S. C.), 48; *Sanborn v. Goodhue*, 28 N. H. 48.

⁴ *Villers v. Beaumont*, 1 Vern. 100; *Bale v. Newton*, 1 Vern. 464; *Boughton v. Boughton*, 1 Atk. 625.

⁵ *Beard v. Nutthall*, 1 Vern. 427; *Allen v. Arme*, 1 Vern. 365; *Clavering v. Clavering*, Prec. Ch. 235; S. C. 2 Vern. 473, affirmed 1 Bro. P. C. 122; *Oxley v. Lee*, 1 Atk. 625; *Beatson v. Beatson*, 12 Sims. 281; *Naldred v. Gilham*, 1 P. Wms. 577; *Colton v. King*, 2 P. Wms. 358. *Contra*, *Chadwick v. Doleman*, 2 Vern. 528. Where a magistrate accepted the offer of a prisoner to pay a certain sum of money to the poor of the parish if a criminal case pending before him were dismissed, it was held that the donor could recover back the money after he had paid it: *Taylor v. Lendey*, 9 East. 49. Where a husband had land conveyed to his wife, and after her death erased her name and inserted his own, it was held that he did not thus vest the fee in himself: *Berry v. Kinnaird*, 20 S. W. Rep. 511.

⁶ *Johnson v. Stevens*, 22 La. Ann. 144; *Board, etc., v. Auditor-General*, 68 Mich. 659; *Dole v. Lincoln*, 31 Me. 422; *Cranz v. Kroger*, 22 Ill. 74; *Miller v. Le Piere*, 136 Mass. 20; *People v. Johnson*, 14 Ill. 342; *Faxon v. Durant*, 9 Met. 339; *Gano v. Fisk*, 43 Ohio St. 462; *Houser v. Singiser*, 1 Leg. Chron. (Pa.) 145.

⁷ *Dismukes v. Musgrave*, 2 La. 337; *Whiting v. Barrett*, 7 Lans. 106.

hands of a third person, and directed the maker to pay the amount due on it to such third person on the payee's decease, and afterward died, it was considered that such third person was not entitled to the note as against one who, by the subsequent will of the payee, was made legatee of the note and executor of the will, for the reason that it was not a valid gift *inter vivos*, because it did not go into absolute and immediate effect, the donor having parted only with the possession and not the dominion over the property; and it was invalid as a *donatio mortis causa*, for the note was not delivered in the donor's last sickness, nor when he was in peril of death, nor under any special apprehension of such peril.¹ A was employed by B at a monthly salary. He directed B to pay one-fourth of his salary, each month, to C, for the benefit of the latter's wife and children, as a donation or gift from him. B failed to pay the money, and C died, whereupon A sued B for the amount he was directed to pay C. It was held that he could recover, because the gift was not completed by delivery—the payment by B to C; but it was said, if A had made some binding promise to the beneficiaries, the gift, or rather contract, would have been valid, and A could not have recovered it.² If A had paid the money to C, of course there could have been no revocation.³ So, where A agreed with B, if the latter would collect a large sum of money, he could retain out of it a certain named sum as a gift for his (A's) lifetime, and then at his (A's) death he was to pay it to C without interest, it was held that the gift was a completed one and could not be revoked.⁴ But a parol gift of an account on

¹ Craig v. Kittredge, 46 N. H. 57.

² Burke v. Steele, 40 Ga. 217; Swartz v. Earls, 53 Ill. 237.

³ Howard College v. Pace, 15 Ga. 486. That an undelivered gift may be revoked, see Carswell v. Ware, 30 Ga. 267.

⁴ Gordon v. Green, 10 Ga. 534.

a third person is executory and revocable at any time before the money or part of it is paid to the donee; and notice to the debtor not to pay it except to his own creditor, the donor, is a revocation.¹ So, where A, having certain funds to his credit at his banker's, directed them to carry part of such funds to the account of certain persons as trustees for his wife and after her death for his son, and such sums were accordingly carried over by the bankers to the account of such persons in their books, and the dividends were from time to time carried to the same accounts, but the testator never communicated the facts to the trustees, and there was some evidence that the testator had directed the transfer under an impression that he should be able, by that means, to evade the legacy duty, and that he had shown an intention to exercise some acts of ownership over the funds, the court held that the appropriations were void and that the testator might at any time have revoked them. Consequently his personal representatives received the amount of the deposit.² Even though the donor delivers the gift to a third person for the donee, yet, if he retain any control over it inconsistent with a relinquishment of the dominion over it, he may revoke the gift.³

107. MINOR MAY REVOKE—CREDITORS.—But if the gift is made by a minor, he may revoke it when he becomes of age, although his subsequent creditors cannot elect to revoke it for him.⁴ So his administrator, if the minor died during his minority, may rescind the gift and

¹Chandler v. Chandler, 62 Ga. 612.

²Gaskell v. Gaskell, 2 Yong. & J. 501. City Wharton v. Walker, 4 B. & C. 163; S. C. 6 Dowl. & Ry. 288.

³Meiggs v. Meiggs, 15 Hun, 453. Heirs may ratify an incomplete gift: Ventress v. Brown, 34 La. Ann. 448.

⁴Johnson v. Alden, 15 La. Ann. 505; Holt v. Holt, 59 Me. 464.

recover back the thing given,¹ even though the donee be the donor's father.²

108. GIFT FOR BENEFIT OF THIRD PERSON.—If the gift is made in favor of a third person, there can be no revocation without the consent of the beneficiary. This is particularly true where property is conveyed to another as a gift, upon the express condition that the donee shall pay a third person a certain sum of money or perform for him a specified benefit. In all such cases the beneficiary must consent to the revocation before the gift can be revoked.³ In such an instance the consent of both the donee and the beneficiary is essential to enable the donor to revoke the gift.⁴ So, where an agent bought land in the name of a third person, intending it as a gift to him, it was held that he could do no act to revoke the gift, even though the donee had not actually accepted.⁵ But where a father directed the proceeds of certain bales of cotton to be applied by his factor in payment of a specific debt of his son, it was held that he could countermand the direction at any time before the factor had appropriated the money as directed, or before he had entered into any engagement with the son's creditor to hold it to his use.⁶ But if the donor deliver the thing given to a third person to deliver in the future to the donee, he may revoke the gift at any time before the donee has actually or constructively received the custody of the article given. "If it be delivered to a third person," said the Supreme Court of Massachusetts, "with authority to deliver it to

¹ *Dinsmore v. Webber*, 59 Me. 103.

² *Ib.*

³ *Eskridge v. Farrar*, 34 La. Ann. 709; *Duplessis v. Kennedy*, 6 La. 231; *Poirier v. Lacroix*, 6 Can. L. Jur. 302.

⁴ *Crawford v. Puckett*, 14 La. Ann. 639; *Nolen v. Harden*, 43 Ark. 307.

⁵ *Giannoni v. Gunny*, 14 La. Ann. 632.

⁶ *Walton v. Tims*, 7 Ala. 470.

the donee, this depository, until the authority is executed by an actual delivery to and acceptance by the donee, is the agent of the donor, who may revoke the authority and take back the gift.”¹

109. *ESTOPPEL TO DENY GIFT.*—A donor may so conduct himself as to estop himself to deny the validity of the gift. Thus, a father purchased land and had it conveyed to his infant son. He then made improvements thereon and occupied it as a residence. In order to borrow money on the property to pay for the improvements, he had himself appointed as guardian of his son, and in his sworn petition for the appointment stated that the property belonged to the son. It was held that he was estopped from afterward recovering title to the property on the ground that the son held it only in trust for him.²

110. *REVOCATION OF A TRUST.*—Like a gift for the benefit of a third person, a trust once created cannot be revoked, unless all persons interested consent to the revocation. Thus a mortgagee of an equitable mortgage, created by a deposit of the title deeds, signed a memorandum, written by the mortgagor, accompanying the deposit, which contained directions to the mortgagor to pay off the mortgage debt by certain quarterly installments, and after paying a specified amount to the mortgagee, to invest the remaining installments in consols for the benefit of the children of a third person. Afterward the mortgagee signed a memorandum written by the mortgagor,

¹*Sessions v. Moseley*, 4 Cush. 87; *Smith v. Ferguson*, 90 Ind. 229; *Grenier v. Leroux*, 1 Leg. News, 231.

²*Kramer v. Kramer*, 68 Ia. 567. See *McCarthy v. McCarthy*, 36 Conn. 177; *Bruner v. Bruner*, 115 Ill. 40. If the heir ratify an invalid gift, he is estopped to reclaim the property: *Brown v. Niethammer*, 141 Pa. St. 114; *Ventress v. Brown*, 34 La. Ann. 448.

directing him to continue to pay the installments of the debt to her, and not invest them in consols as previously directed ; but it was held that the effect of the first memorandum and the notice thereof to the mortgagor created a valid and irrevocable trust, which the mortgagee could not annul, and that the children of such third person were entitled to the amount of the funds thus put in trust.¹ In this case the beneficiaries had no knowledge of the trust until after the attempted revocation.²

111. RESERVATION OF RIGHT TO REVOKE GIFT.—If the gift is a perfected one, a reservation of the right to revoke it is void ; this is especially true of a reservation inserted in a deed of gift of a chattel. Such a reservation is inconsistent with the operative portion of the instrument ; and for that reason void.³ But if the reservation of a right to revoke arises only on the happening of a certain contingency, then it is valid ; and the right may be enforced when the contingency happens.⁴ A reservation of the right to revoke may defeat a gift. Thus where a father by deed transferred personal property to his son, and the latter delivered to his father an instrument reciting the deed of gift, agreeing to care for his father and furnish him money to live on, and stipulating that he would transfer back the property at any time his father desired it, this was held not to be a gift, because of the power of revocation, but was a valid trust, and the property

¹ Paterson v. Murphy, 11 Hare, 88 ; S. C. 17 Jur. 298 ; 22 L. J. Ch. 882 ; 1 Eq. Rep. 173 ; 1 W. R. 274 ; 17 E. L. & Eq. 287 ; Moore v. Darton, 4 DeG. & S. 517.

² See two kindred cases: Bayley v. Boulcott, 4 Russ. 345 ; Maguire v. Dodd, 9 Irish Ch. (N. S.) 452.

³ Daniel v. Veal, 32 Ga. 589 ; Rosenberg v. Rosenberg, 40 Hun, 91. A reserved right of revocation is not inconsistent with the creation of a valid trust ; and if not exercised by the donor during his life, the gift remains valid: Lines v. Lines, 142 Pa. St. 149. See Rosenberg v. Rosenberg, 40 Hun, 91.

⁴ Yonn v. Pittman, 82 Ga. 637.

thus transferred was held by the transferee in trust for the donor; and the son having agreed to pay, at his father's death, certain named sums to designated persons, he was held a trustee, at the donor's death, for such persons to the amount they were entitled to, and the remainder of the property, it was said, belonged to the son.¹

112. DEED OF GIFT MORTIS CAUSA CANCELLED.—If a conveyance is made as a gift, in expectation of death, and death does not follow from the then illness, a court of equity will entertain a bill to cancel the deed, even if it be for real estate, on the ground of mutual mistake.²

113. FRAUD OR UNDUE INFLUENCE.—If a gift is brought about by fraud or undue influence, as has been elsewhere discussed,³ it may be revoked by the donor⁴ or his personal representatives or heirs, according to the descent of the property given.

114. REVOCATION OF CONDITIONAL GIFT.—If a donor make a conditional gift and deliver the thing given to a third person to deliver to the donee when the condition is performed, the donor may revoke the gift at any time before the performance of the condition.⁵

115. DELIVERY IN ESCROW.—A gift may be delivered to a third person in escrow for the donee. Such gifts are in fact conditional gifts, and may be revoked at any time before they have become absolute. Thus where the donor delivered a deed of gift to the husband of the donee, in

¹ *Rosenburg v. Rosenberg*, 40 Hun, 91.

² *Houghton v. Houghton*, 34 Hun, 212; *Forshaw v. Welsby*, 30 Beav. 243; *Wollaston v. Tribe*, L. R. 9 Eq. 44; *Garnsey v. Mundy*, 24 N. J. Eq. 243.

³ See Section 35.

⁴ *Sauley v. Jackson*, 16 Tex. 579; *Millican v. Millican*, 24 Tex. 426.

⁵ *Houser v. Singiser*, 1 Leg. Chron. (Pa.) 145; *Lyon v. Marclay*, 1 Watts (Pa.), 271.

pursuance of a distinct understanding and agreement that it should not be recorded or take effect without the donor's consent, and that if she desired to have it returned to her unrecorded, the contemplated gift should become inoperative and void; it was held that a delivery in violation of the understanding and agreement was ineffectual to make the gift valid, and that the gift could be revoked. A decree was entered ordering the gift-deed cancelled.¹

116. REVOCATION BY DEATH.—If the article is delivered to a third person to be delivered by him to the donee, this depositary, as we have seen, until the authority is executed by an actual or perhaps a constructive delivery to and acceptance by the donee, is the agent of the donor, who may revoke the authority and take back the gift; “and, therefore, if the delivery do not take place in the donee's lifetime, the authority is revoked by his death.”² This is true even where the donor has given a power of attorney authorizing the making of the gift.³

117. WEDDING PRESENTS, INTENDED MARRIAGE BROKEN OFF.—If an intended husband make a present, after the treaty of marriage has been negotiated, to his intended wife, and the inducement for the gift is the fact of her promise to marry him, if she break off the marriage, he may recover from her the value of such present.⁴ But he may not recover back a gift made to a person to induce him to introduce the donor to a woman and by means thereof to gain her favor.⁵

¹ *Fritz v. Brustle*, 41 Leg. Int. 4.

² *Sessions v. M. seley*, 4 Cush. 87; *Smith v. Ferguson*, 90 Ind. 229.

³ *Hergesheimer's Estate*, 3 Pa. C. C. 159; *Keyl v. Westerhaus*, 42 Mo. App. 49.

⁴ *Williamson v. Johnson*, 62 Vt. 378; S. C. 20 Atl. Rep. 279; *Robinson v. Cummings*, 2 Atk. 409; 14 Vin. Abr., title Gift, pl. 7; Fonb. Eq., sect. 15; 1 Com. Dig. 313; *Stauffer v. Morgan*, 39 La. Ann. 632; S. C. 2 So. Rep. 98.

⁵ *Robinson v. Cummings*, *supra*. See Section .

118. UNINTENDED GIFT—MISTAKE.—A gift may be void and for that reason may be revoked. Suppose a donor of a golden vessel gives it away, laboring at the time under the impression that it is a gilt one. Here is a mistake; he has given what he had no actual intention to give, and it makes no difference that the donee knew it was a golden one. To allow a rescission by the donor of the gift works no injury to the donee, while it restores to the donor a thing he never knowingly parted with. But if the donor intended to give a vessel of gold and by mistake gave one of gilt, the gift is binding both upon him and the donee; for the donor suffers no damage from the transaction, while, if the facts were reversed, he would be a loser.¹ Such at least is the Roman law; but why should there be any difference? In either instance there was no actual intention to give the thing given; there was an actual mistake on the part of the donor; and by what right has the law to say he values a gold vessel higher than a gilt one? Intention to give the thing given is one of the essential parts of a valid gift, and if that be absent there can be no gift; so that to hold the gift of a gilt vessel valid when a gold one was intended is to hold valid a gift where there was no intention to make it. The loss to the donor is not necessarily a part of the consideration in the argument; it is totally immaterial.²

119. IMMORALITY DOES NOT REVOKE.—A gift completed cannot be revoked because of the immoral purpose for which it was given. In this respect it is like a contract based upon an illegal consideration; for when the latter is executed it cannot be rescinded, and the courts

¹ Savigny L. 22 de V. O. (25, 1); 1 Whart. Cont., sect. 195.

² See generally, on mistake, Section 450.

will leave the persons to it where they have placed themselves.¹ Thus past cohabitation alone will not render a gift by the party holding such a relation to the donee void or illegal.² So usually a gift upon an illegal condition will be valid, the condition being void.³

120. CHANGE OF POSITION BY DONEE IN VIEW OF GIFT—ACQUIESCENCE.—A gift, although imperfect, may become of such a vested character as to prohibit the donor's revoking it. Thus a father dying willed his farm, dividing it between them, to his two sons, each half charged with an equal annuity in favor of their mother. The two sons and mother lived together two years, and the sons paid off their father's debts. One of the sons being ready to marry, the mother and the other son moved to the latter's part of the farm, leaving the first son in possession of his part; and they divided equally between them, with the assistance of others, their father's personal property. At the time of this division the mother said she would forgive her sons the two years' arrears of the annuities, and repeated it afterward several times, both before and after the marriage, assigning as a reason that they had fed, clothed, and housed her, had given her all she wanted, had paid her husband's debts, had been good to her, she wished them well, and that they could not pay the debts, keep her, and pay the annuities. After the death of the married son, she attempted to withdraw the gift of the annuity his part of the farm had been charged with, although she made no such attempt as to the surviving son, and attempted to enforce

¹ *Carter v. Montgomery*, 2 Tenn. Ch. 216; *Bivins v. Jarnigin*, 3 Baxt. 282; *Hill v. Freeman*, 73 Ala. 209 (a contract).

² *Smith v. Du Bose*, 78 Geo. 413; *Beall v. Beall*, 8 Ga. 210, 224; *Hargroves v. Freeman*, 12 Ga. 342; *Davis v. Moody*, 15 Ga. 175.

³ *Hoggatt v. Gibbs*, 15 La. Ann. 700.

it against the land ; but the court held that this she could not do, even though her intention not to enforce the annuity was only expressed verbally, because of the fact that she had acquiesced so long in the understanding of all of them, and the circumstances and conditions of the son and mother had become altered.¹

121. GIFT OF REAL ESTATE BY PAROL.—A parol gift of real estate may be revoked, but at what period after the making of the gift is not settled. Thus in Alabama it is said that the gift creates a mere tenancy at will, and it may be revoked or disaffirmed by the donor, unless an adverse possession under it had continued for the statutory period.² But, as has elsewhere been shown at length, this is not the law in many of the States. It seems clear, upon principle, that a donor cannot revoke a parol gift of land after the time at which the donee is entitled to enforce a specific performance for conveyance of the legal title, or can successfully defend against an action brought by the donor for possession of the land given. At these periods of time the gift has become a perfected one, and it is irrevocable. The circumstances, however, of the donee may have not been sufficiently changed to entitle him to hold the land, but they may be such as to entitle him to damages.³

122. REDELIVERY.—It by no means follows that a delivery back by the donee to the donor of the thing given will amount to a revocation. There are many cases which hold that it does not ;⁴ but the redelivery may be accompanied by such circumstances that the fact of redelivery

¹ Long v. Long, 16 Gr. Ch. (Can.) 239 ; S. C. 17 Ib. 251.

² Collins v. Johnson, 57 Ala. 304 ; Hulbard v. Allen, 59 Ala. 283.

³ See Pearce v. Gibbon, 6 Rev. Leg. 649.

⁴ See Sections 209, 210.

will be construed as a revocation. Thus where a donor, in anticipation of death, by an agreement in writing disposed of his effects, and at the same time delivered the possession of them, a redelivery by the donee to the donor was considered to be a revocation of the gift.¹ But such is not necessarily the case, as has been said. Thus the gift of a note, fully executed, was held not revoked by the fact that the donee redelivered it to the donor, under an agreement with her that she could collect thereon such an amount as she might need for her support if she should become poor.²

123. DONATIO MORTIS CAUSA.—A gift *donatio mortis causa* may be revoked by the donor at any time before his death, although all the formalities have been observed necessary to make such a gift valid;³ and after the act of revocation he may give it to another. Indeed giving it a second time, to another person, is a revocation of the first gift,⁴ even if it is given by will executed subsequent to the gift, according to some of the cases.⁵ But if the will is executed before the gift is made, the gift is not revoked.⁶ Of course, as is elsewhere discussed,⁷

¹ Wigle v. Wigle, 6 Watts, 522.

² Marston v. Marston, 64 N. H. 146.

³ Taylor v. Henry, 48 Md. 550, 559; S. C. 30 Am. Rep. 486; Duncan v. Duncan, 5 Litt. 12; Parish v. Stone, 14 Pick. 198; Gass v. Simpson, 4 Coldw. 288; Harris v. Clark, 2 Barb. 94; affirmed 3 N. Y. 93; Dole v. Lincoln, 31 Me. 422.

⁴ Parker v. Marston, 27 Me. 196; Bunn v. Markham, 7 Taunt. 224; Wells v. Tucker, 3 Binn. 366, 370.

⁵ Jones v. Selby, Prec. Ch. 300; Hambrooke v. Simmons, 4 Russ. 25; Jayne v. Murphy, 31 Ill. App. 28; Huntington v. Gilmore, 14 Barb. 243; Bloomer v. Bloomer, 2 Bradf. 339; Edwards v. Jones, 1 My. & Cr. 226, 233; Basket v. Hassell, 107 U. S. 602; Bunn v. Markham, 7 Taunt. 224, 231.

⁶ Merchant v. Merchant, 2 Bradf. 432; Nicholas v. Adams, 2 Whart. 17, 22; Reddel v. Dobree, 10 Sims. 244.

⁷ See Section 42.

a recovery of the donor from his then sickness is of itself a revocation of the gift.¹

124. BURDEN TO SHOW NON-REVOCATION IN A VOLUNTARY DEED OF SETTLEMENT.—In the case of a voluntary settlement by deed, as a marriage settlement, the donee must show very distinctly the intent of the donor to make the gift, for in the absence of a certain intent to make the gift irrevocable, the omission of a power to revoke it is *prima facie* evidence of a mistake, and casts the burden of supporting the settlement upon the donee.² “A person taking a benefit under a voluntary deed which is not subject to a power of revocation has thrown upon him the burden of proving that the gift was meant by the donor to be irrevocable,” and “a voluntary gift not subject to a power of revocation, but not meant to be irrevocable, may be set aside by the donor.”³

125. REVOCATION UNDER SPANISH AND MEXICAN LAW.—In the States of Louisiana, Texas, California, and perhaps in Colorado, as well as in the Territories of New Mexico and Arizona (perhaps) the Spanish and Mexican law has been in force with respect to gifts between husband and wife. These laws in this respect differ from the common law. “Such donations,” it is said, “are prohibited in order that the parties may not be prejudiced thereby, and dispossess themselves of their property, through their mutual affection; and also because the one

¹ *Staniland v. Willott*, 3 MacN. & Gor. 664; *Wells v. Tucker*, 3 Binn. 366; *Chevallier v. Wilson*, 1 Tex. 161; *Bates v. Kempton*, 7 Gray, 382.

² *Russell's Appeal*, 75 Pa. St. 269.

³ *Wollaston v. Tribe*, L. R. 9 Eq. 44; *Hall v. Hall*, L. R. 14 Eq. 365; *Coutts v. Acworth*, L. R. 8 Eq. 558; *Forshaw v. Welsby*, 30 Beav. 243; *Phillips v. Mullings*, L. R. 7 Ch. Ap. 244; *Phillipson v. Kerry*, 32 Beav. 628; *Huguenin v. Baseley*, 14 Ves. 273; *Cooke v. Lamotte*, 15 Beav. 234; *Garnsey v. Mundy*, 13 Am. L. Reg. 345; *Miskey's Appeal*, 107 Pa. St. 611.

who was the most avaricious would be in a better condition than the other who gave freely. And if they do make any such gifts after marriage they will not be valid, if one of the parties become thereby poorer and the other richer, unless he who made the donation did not revoke or annul it during his life, for then it would remain valid. But if the party making the donation revoke it during his life by expressly saying: 'I do not wish such a donation made to my wife should be valid;' or if he observe silence in this respect, and afterward give or sell the same thing to another person; or if the party receiving the donation die before the party who made it, in either of these cases the first donation will become void."¹ In construing this law and others, the Supreme Court of California said: "By this, and others of like import, a donation made by a wife to her husband or by a husband to his wife, was revocable during the life and at the instance of the donor; and conversely it became valid if not revoked at the death of the donor, if the donee then survived."²

126. REVOCATION BY BIRTH OF CHILD.—Under the law in force in Louisiana in 1820, if a husband and wife gave to the survivor the property of the first one of them dying, if there be no child born of their marriage, the donation was revoked by the birth of a child, and not revived by his death during their joint lives.³

127. CIVIL AND FRENCH LAW.—French writers on the civil law speak of gifts as *contrats de bienfaisance*, or con-

¹ Law 4, Title 11 of the 4 Partidas, translated in *Fuller v. Ferguson*, 26 Cal., p. 574.

² *Fuller v. Ferguson*, 26 Cal., p. 574; *Labbe v. Abat*, 2 La. 553; *Holmes v. Patterson*, 5 Mart. 693; *Scott v. Ward*, 13 Cal. 458.

³ *Frideau v. Frideau*, 8 Mart. 707. See *Sirois v. Michaud*, 2 Low. Can. Rep. 177.

tracts of beneficence, the object of the person making it being to confer a benefit on the promisee. The Code Napoleon follows the Roman law, and agreeable to the latter a gift may be recalled for the ingratitude of the donee or his ill-treatment of the donor. He who seeks to enforce by legal process a promise to give is deemed unjust and harsh, and must be prepared to show that there is no doubt of the donor's design to make a gift, and that he went so far toward completing it that he cannot justly change his mind.¹

¹ Hare on Contracts, 182, 183. Citing Pardessus No. 176; Delsol, livre III, tit. iii, ch. iii, sect. 4; Code Napoleon, Art. 955.

CHAPTER IX.

DELIVERY.

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212. Donee of Imperfect Gift May Maintain an Action Against a Wrong-Doer.
213. Proof of Delivery.
214. Question for Jury.

128. INTRODUCTION.—Nearly all the cases involve questions of delivery ; and this branch of the subject has

assumed far more importance than any other; indeed, it has occupied the attention of the courts more than all the others combined. While general rules may be laid down touching the sufficiency of a delivery, yet they are not always infallible guides. "While every case must be brought within the general rule upon the points essential to such a gift," said Justice Mitchell, of Indiana, "yet, as the circumstances under which *donationes mortis causa* are made must of necessity be infinite in variety, each one must be determined upon its own peculiar facts and circumstances."¹

129. DEFINITION OF DELIVERY.—A delivery of a chattel, in the instance of a gift, is a transfer of possession, either by actual tradition—from hand to hand—or by an expression of the donor's willingness that the donee should take the chattel when it is present and in a situation to be taken by either party.²

130. RULE REQUIRING DELIVERY THE SAME IN GIFTS INTER VIVOS AND MORTIS CAUSA.—The courts almost unanimously lay down the rule that what is a good delivery in a *donatio inter vivos* is also a valid delivery in a *donatio mortis causa*; and that there is in this respect no difference in the requisites of a good delivery in those two classes of gifts.³ "After examining all the cases,"

¹ *Devol v. Dye*, 123 Ind. 321, citing *Dickeschied v. Exchange Bank*, 28 W. Va. 340, and *Kiff v. Weaver*, 94 N. C. 274; 55 Am. Rep. 601. The Virginia statute requiring actual possession to be given has no reference to a gift *mortis causa*: *Thomas v. Lewis*, 15 S. E. Rep. 389.

² *Caldwell v. Wilson*, 2 Speer Eq. (S. C.) 75. "What shall constitute a delivery has not, perhaps, been very accurately defined. In *Davis v. Davis*, reported in a note to *Brashears v. Blasingame*, 1 N. & McCord, 225, the idea is that any act will do which is significant of the donor's intention that the transfer shall take effect at the time. The same thing is to be found in other authorities. In *Reid v. Colcock*, 1 N. & McCord, 592, that seems to be regarded as a sufficient delivery which would authorize the donee to take possession without committing a trespass:" *Blake v. Jones*, Bail. Eq. (S. C.) 141.

³ *Harris v. Clark*, 3 N. Y. 93.

said Justice Nott, "brought to the view of the court, I have not been able to discover any foundation for the distinction made between a *donatio causa mortis* and any other parol gift."¹

131. DELIVERY ESSENTIAL.—In all gifts a delivery of the thing given is essential to their validity; for although every other step be taken that is essential to the validity of a gift, if there is no delivery, the gift must fail. Intention cannot supply it; words cannot supply it; actions cannot supply it; it is an indispensable requisite, without which the gift fails, regardless of the consequences. In speaking of a *mortis causa*, the Supreme Court of South Carolina said: "From the nature of the *donatio*, it is apparent that the infallible test, which must distinguish it from a testamentary gift, is delivery, change of dominion *in presenti*. Without this there is really nothing to distinguish it from an ordinary testamentary bequest."²

¹ *McDowell v. Murdock*, 1 Nott. & McC. 237; *Brinckerhoff v. Lawrence*, 2 Sandf. Ch. 400; S. C. 2 N. Y. Leg. Obs. 424. "Gifts *inter vivos* and gifts *causa mortis* differ in nothing, except that the latter are made in expectation of death, become effectual only upon the death of the donor, and may be revoked. Otherwise, the same principles apply to each." *Dresser v. Dresser*, 46 Me. 48; *Shackleford v. Brown*, 89 Mo. 546; *McCord v. McCord*, 77 Mo. 166; *Walter v. Ford*, 74 Mo. 195; *Chevallier v. Wilson*, 1 Tex. 161; *Young v. Young*, 80 N. Y. 422; *Martin v. Funk*, 75 N. Y. 134; *Meriwether v. Morrison*, 78 Ky. 572; *Conser v. Snowden*, 54 Md. 175; *Robson v. Jones*, 3 Del. Ch. 51; *Harris v. Clark*, 3 N. Y. 93.

² *Trenholm v. Morgan*, 28 S. C. 268; *Ganmon Theological Society v. Robbins*, 128 Ind. 85. The civil law did not require a delivery: *Noble v. Smith*, 2 Johns. 52. For common-law cases, see *Grangiac v. Arden*, 10 Johns. 293 (a lottery ticket); *Cook v. Husted*, 12 Johns. 188; *Taylor v. Fire Department*, 1 Ed. Ch. 294; *Miller v. Jeffrees*, 4 Gratt. 472; *Smith v. Hardy*, 36 Wis. 417; *Delmotte v. Taylor*, 1 Redf. 417; *McCraw v. Edwards*, 6 Ired. Eq. 202. Merely saying to the donee, "I give you my money in the savings bank," without a delivery of the deposit-book, is insufficient to make the gift perfect—for a want of delivery: *French v. Raymond*, 39 Vt. 623; *Bradley v. Hunt*, 5 G. & J. 54; *Taylor v. Henry*, 48 Md. 550; S. C. 30 Am. Rep. 486; *Pennington v. Gittings*, 2 G. & J. 208; *Hebb v. Hebb*, 5 Gill. 506; *Conser v. Snowden*, 54 Md. 175; *Haygood v. Marlowe*, 51 Ala. 478; *Huddleston v. Huey*, 73 Ala. 215; *Walker v. Crews*, 73 Ala. 412; *Brantley v. Cameron*, 78 Ala. 72; *Hedges v. Hedges*, Prec. Ch. 269; S. C.

132. REASON FOR RULE REQUIRING A DELIVERY.—The reason for the rule requiring a delivery is obvious; it is based upon “grounds of public policy and convenience,

Gilb. Eq. 12; 2 Eq. Abr. 263, case 4; 2 Vern. 615; 7 Viner. Abr. tit. Custom of London, b. 8; reversed 1 Brown P. C. 254; *Spratley v. Wilson*, Holt N. P. 10; *Hooper v. Goodwin*, Wils. Ch. 212; *Murray v. Cannon*, 41 Md. 466 (bank deposit held an invalid gift); *Cox v. Hill*, 6 Md. 274; *Hitch v. Davis*, 3 Md. Ch. 266; *Hanson v. Millett*, 55 Me. 184. In Virginia a statute was long in force that a parol gift of slaves, however well intended, and however well the delivery, was void: *Merrit v. Smith*, 6 Leigh, 486; *Turner v. Turner*, 1 Wash. (Va.) 139; *Jordan v. Murray*, 3 Call. 85; *Spires v. Willison*, 4 Cranch. 398; *Ward v. Audland*, 8 Beav. 201; *Scott v. Reed*, 25 Atl. Rep. 604; *Peeler v. Guilkey*, 27 Tex. 355; *Ewing v. Ewing*, 2 Leigh, 337; *Sterling v. Wilkinson*, 83 Va. 791; *Lee v. Luther*, 3 Wood & M. 519; *Patterson v. Williams, Lloyd & Goold, Jr.* Ch. Cas. 95; *Teague v. Griffin*, 2 N. & McC. 93; *Reid v. Colecock*, 1 N. & McC. 592; *Reed v. Spaulding*, 42 N. H. 114; *Dilts v. Stevenson*, 17 N. J. Eq. 407; *Allen v. Cowan*, 23 N. Y. 502; *Martin v. Funk*, 75 N. Y. 134; *Young v. Young*, 80 N. Y. 422; *Jackson v. Street R. W. Co.*, 88 N. Y. 520 (reversing 15 J. & S. 85); *Neufville v. Thomson*, 3 Ed. Ch. 92; *Newman v. Wilbourne*, 1 Hill (S. C.), Eq. 10; *Cordery v. Zealy*, 2 Bailey L. 205; *Anderson v. Belcher*, 1 Hill (S. C.), L. 246; *Bedell v. Carll*, 33 N. Y. 581; *Fulton v. Fulton*, 48 Barb. 581; *Hackney v. Vrooman*, 62 Barb. 650; *Keniston v. Sceva*, 54 N. H. 24; *Montgomery v. Miller*, 3 Redf. 154; *Banks v. Marksberry*, 3 Litt. 275; *Kirkpatrick v. Finney*, 30 La. Ann. 223. Where a witness testifies that the donor while sick, “requested me to take charge of his effects, consisting of bank-book, money, and assignments of mortgages and deeds, and other papers, and requested me to hold them in trust for him until he got well; and if he should die he requested me to transfer them to his daughter Emma for her use;” and “that was the condition I received them on the 7th of May; I was to keep them in trust for him, and if he lived and got well, I was to return all his property to him; and if he died, I was to give it to his daughter Emma;” and it was admitted “that the bank-book offered in evidence was the same book delivered to” the witness; it was held that the evidence did not show a delivery to the witness: *Daniel v. Smith*, 64 Cal. 346. We believe this decision is incorrect. There is no jury in Christendom, of intelligent men that would not have reached the conclusion that there was an actual delivery; and in so doing they would have only adopted a natural view of every-day language and experience. The case is made to hinge upon this point alone. Afterward upon a second appeal it was decided that the gift was not valid, for the reason that the donor had received the right to use so much of the fund given as he might need, though none of it was used. This is tenable ground, and sufficient to show that dominion over the fund was not relinquished: *Daniel v. Smith*, 75 Cal. 548. The declaration of J. that he had given a slave to B. and then hired it from him, without a delivery of the slave, is insufficient to perfect a parol gift: *Bryant v. Ingraham*, 16 Ala. 116. See generally on delivery, *Jones v. Deyer*, 16 Ala. 221; *Stallings v. Finch*, 25 Ala. 518; *Hunley v. Hunley*, 15 Ala. 91; *O'Brien v. O'Brien*, 4 Ontario, 450;

and to prevent mistake and imposition.”¹ Such gifts open the door for fraud and perjury; and as these gifts are usually claimed upon parol evidence, it is difficult to meet and overthrow such claims, when the alleged

Brunson v. Brunson, Meigs, 630; *Dunbar v. Woodcock*, 10 Leigh. 628 (bond); *Payne v. Powell*, 5 Bush. 248; *Brown v. Brown*, 4 B. Mon. 535; *Poullain v. Poullain*, 79 Ga. 11; *Evans v. Lipscomb*, 31 Geo. 71; *Noble v. Smith*, 2 Johns. 52; *Grangiac v. Arden*, 10 Johns. 293; *Little v. Willets*, 55 Barb. 125; *Cooper v. Burr*, 45 Barb. 9; *Hunter v. Hunter*, 19 Barb. 631; *Huntington v. Gilmore*, 14 Barb. 243; *Doering v. Kenamore*, 86 Mo. 588; *McCord v. McCord*, 77 Mo. 166; *Trough's Est.*, 75 Pa. St. 115. A bought a piano on agreement that she was to have the title when she paid for it. She died before completing full payment, and after her death her administrator paid off the debt. Before she died she sent the piano to B as a gift. Held, a valid gift: *Nicholson v. Thomas*, 8 W. N. Cas. 195. See generally, *Carter v. Buckingham*, 1 Handy, 395; *Armitage v. Mace*, 96 N. Y. 538; S. C. 16 J. & S. 107. When a gift of a chattel is found or stated in a case, a delivery is presumed; and it will be presumed that the donee continued in possession until the contrary is shown: *Spiers v. Alexander*, 1 Hawks. 67; *Caldwell v. Wilson*, 2 Speer Eq. 75. Owing to the fact that the difference between the common and civil law with reference to the delivery of gifts has not been observed, an error has crept into a few cases with respect to the necessity of a delivery. In a note to the case of *Lunn v. Thornton*, 1 C. B. 379, Manning, J., says: “With respect to donations *inter vivos*, gifts by parol are revocable and incomplete, until acceptance (*i. e.*, acquiescence in the gift) by the donee, but gifts by deed are perfect and complete, and vest the property in the donee, until disclaimer (which disclaimer may be by parol); and after acceptance, in the former case, and until disclaimer in the latter, the property vests in the donee, without any delivery.” In *Flory v. Denny*, 7 Exch. 581, Parke, B., approves this language. Similar language was used in a note to *London, etc., R. W. Co. v. Fairclough*, 2 M. & Gr. 674, 691, and in the argument to *Winter v. Winter*, 4 L. T. N. S. 639. The Canadian Common Pleas followed these decisions, holding that it is sufficient to complete such a gift that the conduct of the parties should show that the ownership of the chattel had been changed: *Queen v. Carter*, 13 C. P. 611; and this latter case was followed in *Viet v. Viet*, 34 Q. B. (Can.) 104, though the gift was probably good without resorting to such extreme language. But the Canadian cases have been discredited in that country: *Travis v. Travis*, 12 Ont. App. 438, affirming 8 Ont. 516. But see *Danby v. Tucker* 31 W. R. 578; *Reeves v. Capper*, 5 Bing. N. C. 56; S. C. 6 Scott, 877; 2 Jur. 1067; *Bourne v. Fosbrooke*, 18 C. B. N. S. 515; S. C. 34 L. J. C. P. 164; 11 Jur. N. S. 202. See the recent English case of *Cochrane v. Moore*, 25 Q. B. Div. 57; S. C. 59 L. J. Q. B. 377; 63 L. T. 153; 38 W. R. 538; 54 J. P. 804; 6 T. L. R. 296. In the case of a gift *mortis causa*, the delivery must be before the death of the donor: *Gescheidt v. Drier*, 20 N. Y. Supp. 11.

¹ *Noble v. Smith*, 2 Johns. 52; *Harris v. Clark*, 3 N. Y. 93, 113; *Delmotte v. Taylor*, 1 Redf. 417.

donor is dead, unless a delivery to the donee is made an absolute and requisite test in determining whether or not a gift was actually consummated—not intended but consummated.¹

¹ *Brinckerhoff v. Lawrence*, 2 Sandf. Ch. 400; *Chevallier v. Wilson*, 1 Tex. 161; *Dickerchied v. Exchange Bank*, 28 W. Va. 340. In North Carolina it was ruled that the reason a delivery was required was in order to identify the property, and that it might answer the purposes of notoriety; but when the identity could be proved, a delivery was not necessary: *Arrington v. Arrington*, 1 Hay. 1.

The entire subject has been discussed at considerable length by Fry, L. J., in a recent case, involving an examination of many of the old authorities. Said he: "In Bracton's day seisin was a most important element of the law of property in land; and, however strange it may sound to jurists of our day and country, the lawyers of that day applied the term as freely to a pig's house as to a manor or a field. At that time the distinction between real and personal property had not grown up: the distinction then recognized was between things corporeal and things incorporeal; no action could then be maintained on a contract for the sale of goods, even for valuable consideration, unless under seal; the distinction so familiar to us now between contracts and gifts had not fully developed itself. The law recognized seisin as the common incident of all property in corporeal things, and tradition or the delivery of that seisin from one man to another as essential to the transfer of the property in that thing, whether it were land or a horse, and whether by way of sale or of gift, and whether by word of mouth or of deed under seal. This necessity for delivery of seisin has disappeared from a large part of the transactions known to our law; but it has survived in the case of feoffments. Has it also survived in the case of gifts?" After a review of many old authorities and cases he says: "This review of the authorities leads us to conclude that according to the old law no gift or grant of a chattel was effectual to pass it whether by parol or by deed, and whether with or without consideration unless accompanied by delivery; that on that law two exceptions have been granted, one in the case of deeds, and the other in that of contracts of sale where the intention of the parties is that the property shall pass before delivery; but that as regards gifts by parol, the old law was in force when *Irons v. Smallpiece* [2 B. & A. 551] was decided; that that case therefore correctly declared the existing law; and that it has not been overruled:" *Cochrane v. Moore*, 25 Q. B. Div. 57; S. C. 59 L. J. Q. B. 377; 63 L. T. 153; 38 W. R. 588; 54 J. P. 804; 6 T. L. R. 296.

"Upon long consideration I have come to the conclusion that actual delivery in the case of a 'gift' is more than evidence of the existence of the proposition of law which constitutes a gift, and I have come to the conclusion that it is a part of the proposition itself. It is one of the facts which constitute the proposition that a gift has been made. It is not a piece of evidence to prove the existence of the proposition; it is a necessary part of the proposition, and, as such, is one of the facts to be proved by evidence:" Lord Esher, M. R., in

133. MERE INTENTION CANNOT TAKE THE PLACE OF A DELIVERY.—Mere intention, however clear or however emphatically and publicly expressed, can never take the place of a delivery, either constructive or actual. Intention to give is essential to the validity of every gift, but it is only one of the requisites to vest the title to the thing given in the donee. But a clearly expressed intention, especially if accompanied by acts corroborating it, may aid an ambiguous delivery, which would otherwise fail; and so acts indicating a clear intent to give may also aid an ambiguous delivery, though not to the extent that a clearly expressed intention may. So, too, a clearly expressed intent, especially if accompanied by acts corroborating it, will more effectually aid a delivery which has been made as complete as the condition of the parties or the circumstances of the transaction will at the time permit.¹ But a court will not hold as discharged a debt due a decedent, on the mere ground of his intention not to enforce it, or of his treating it as not obligatory.²

134. DELIVERY MUST BE SUFFICIENT TO PASS TITLE—TEST.—A delivery to render a gift good must be such that the title passes to the donee; if it does not pass, the gift is void. In the instance of a *donatio mortis causa*, the vesting

Cochrane v. Moore, 25 Q. B. Div. 57, 75; S. C. 59 L. J. Q. B. 377; 63 L. T. 533; 38 W. R. 588; 54 J. P. 804.

If the donee obtain possession of the subject-matter of the gift, supposing there is a valid gift, he is not liable for interest (in case it is a fund) on the fund given, even though he retain it a long time: Hooper v. Goodwin, 1 Swanst. 486.

¹ Devol v. Dye, 123 Ind. 321; Gammon Theological Seminary v. Robbins, 123 Ind. 85; Walker v. Crews, 73 Ala. 412; Delmotte v. Taylor, 1 Redf. 417; Dickerscheid v. Exchange Bank, 28 W. Va. 340; Hitch v. Davis, 3 Md. Ch. 266; Hunter v. Hunter, 19 Barb. 631.

² Robson v. Jones, 3 Del. Ch. 51; Lee v. Luther, 3 Wood & M. 519; Trough's Estate, 75 Pa. St. 115; Carter v. Buckingham, 1 Handy, 395; Jones v. Deyer, 16 Ala. 221; Donover v. Argo 79 Ia. 574. Something by way of delivery must be done to show that the donor's intention has been carried into effect: Tomlinson v. Ellison, 104 Mo. 105.

of the title is, of course, conditional ; but the delivery must be as complete as if it were a *donatio inter vivos*.¹ Of a gift *inter vivos* it was said : "The consummation of every parol gift is delivery. There must be an actual transmutation of possession and property ; and the real question in all such cases is whether the donor has parted with his dominion over it."² In an early Texas case it was said : "The test of delivery—of the consummation of a parol gift of a chattel—is the change of property—the immediate right to entire dominion over the subject of the gift—a perfect title, which is as good against the donor as any one else. . . . The change of property must in all cases be complete at the instant of the gift. The right which had been in the donor must *eo instanti* of the gift be vested in the donee."³

135. PARTING WITH DOMINION OVER THE THING GIVEN.—It is a common remark that to make a gift valid the donor must make such a delivery as will give the donee the present dominion over the property intended to be given.⁴ This is no doubt true ; but this is nothing more than the assertion that the title must pass to the donee, for we understand that if the right of disposal in the donor is lost to him, then he has parted with his dominion over the article given, although he may have regained the physical possession of it, either with or without the consent of the donee.⁵ An old case, however, will

¹ *Gilmore v. Whitesides*, Dudley Eq. 14.

² *McDowell v. Murdock*, 1 Nott. & McC. 237.

³ *Chevallier v. Wilson*, 1 Tex. 161 ; *Dickerschied v. Exchange Bank*, 28 W. Va. 340 ; *Walker v. Crews*, 73 Ala. 412 ; *Pennington v. Gittings*, 2 G. & J. 208 ; *Gartside v. Pahlman*, 45 Mo. App. 160.

⁴ *Gilmore v. Whitesides*, Dudley Eq. 14.

⁵ *Walker v. Crews*, 73 Ala. 412 ; *Devol v. Dye*, 123 Ind. 321. "The owner must part with his dominion and control of the article before the gift takes effect ; mere words alone convey no title, and a present gift must be intended ; the donor must intend to part with the title and control of the thing at the time of making

illustrate the distinction between the words "possession" and "dominion." An intestate in his last illness ordered a box to be carried to the house of the defendant, to be delivered to her, but gave no directions respecting it, nor said anything about giving it to her. On the next day the key was brought to the intestate, who desired it to be taken back, saying that he should want a pair of breeches out of it. It was held that there was no valid gift, the court saying: "In the case of a *donatio mortis causa*, possession must be immediately given; that has been done here; a delivery has taken place, but it is also necessary that by parting with the possession, the deceased should also part with the dominion over it. That has not been done here. The bringing back the key by her the next morning to the intestate, and his declaration that he should want one of the articles of his apparel contained in it, are sufficient to show that he had no intention of making any gift or disposition of the box."¹ So where the owner of a slave, having previously placed it with B, told him that if he never called for it, his (the owner's) wife was to have it, and afterward died, without calling for it, and made no disposition of it by will, it was held that there was no gift, for the reason that the donor never relinquished his dominion over the slave.²

136. MERE POSSESSION BY DONEE NOT SUFFICIENT.—

A delivery, of course, results in placing the donee in the

the gift. A gift to take effect in the future is void." Gammon Theological Seminary v. Robbins, 128 Ind. 85; Sheegog v. Perkins, 4 Baxt. 273; Pennington v. Gittings, 2 G. & J. 208.

¹ Hawkins v. Blewitt, 2 Esp. 663.

² Stallings v. Finch, 25 Ala. 518. On this subject see Nasse v. Thoman, 39 Mo. App. 178; Gartside v. Pahlman, 45 Mo. App. 160; Board v. Callihan, 33 W. Va. 209; Frame v. Frame, 32 W. Va. 463. Where a decedent expecting to die shortly from a disease possessing him, a short time before his death handed to another a certificate of deposit for safe keeping, requesting him to see that the decedent's children got the money in case he died, it was held that there was no valid gift, because of a lack of a delivery: Dunn v. German-American Bank, 18 S. W. Rep. 1139.

possession of and dominion over the article given ; but his mere possession is not sufficient. Speaking of a gift of certain furniture the Surrogate Court of New York city said : " In respect to the furniture, there was a change of possession. But nothing to show that it was done with the knowledge or acquiescence of the testator. The fact that the furniture was in her possession before his death, is not of itself sufficient to warrant the presumption that there was an actual delivery. It should appear that she took possession of it with the knowledge and assent of the donor ; for without this, nothing is shown on his part but the intention to give, which is not enough."¹ Possession to render a gift valid must be of such a character as to indicate an abandonment of dominion by the former owner, and its acquisition by the possessor.² A wife received a banker's draft for the amount of a legacy given to her separate use. She gave the draft to her husband, who paid it into his current account, and on the same day placed it upon a deposit account in his own name, and then showed his wife the deposit note. Shortly after this he died. She having showed that she never intended to give up the control of the money, his executors were ordered to pay her the amount of the legacy.³

137. RIGHT TO USE DISTINGUISHED FROM POSSESSION.—There is a radical distinction between the right to use—the right to make use of—a thing and the right of possession. The right to use an article confers upon the person holding it the power to use the article without being a tres-

¹ *Delmotte v. Taylor*, 1 Redf. 417 ; *Dunbar v. Dunbar*, 80 Me. 152 ; *Miller v. Jeffress*, 4 Gratt. 472 ; *Dickeschied v. Exchange Bank*, 28 W. Va. 340 ; *Bigelow v. Paton*, 4 Mich. 170.

² *Evans v. Lipscomb*, 31 Ga. 71.

³ *Greeny v. Carill*, 4 Ch. Div. 382 ; S. C. 46 L. J. Ch. 477 ; *Trimmer v. Darby*, 25 L. J. Ch. 424.

passer—a wrong-doer—without conferring a property in the thing; but the right of possession gives the right to control the article even as against the actual owner, and is such a right as gives a qualified property in the person entitled to it. A right to merely use an article does not give the person having such right a right to maintain an action in trespass against one injuring it, nor replevin for its possession; but a right of possession gives the person having the right full authority not only to maintain an action in trespass but also in replevin. Two Iowa cases well illustrate this distinction. Thus, a donor gave her grandchild, as it was claimed, a piano, which was in the house and possession of the donor. The donee lived with her father, who lived with his mother in her family and in her house. The grandchild used the piano afterward, as she did before. About six months before any dispute arose about the piano, the son and his family, including the grandchild, moved into another house, but the piano remained in the house of the donor, and was there when levied upon by the creditors of the donor. It was held that the alleged donee had the right to use the piano, but had not the right of possession.¹ The other case is where a father took his fourteen-year-old child to a music store, and bought and presented to her a piano. She had it conveyed to his house, where she lived as a member of the family; but the bill of sale for it was made to him, and he executed a mortgage on the instrument to secure the purchase-money. The piano was put in his parlor, where it remained with his furniture until it was levied upon by his creditors; but from the time of its delivery at the house until levied upon, it was “hers exclusively, and under her sole and exclusive control,” so the court found. There was no conveyance in writing to her

¹ Willey v. Backus, 52 Ia. 401.

by the father, nor any notice of her ownership put on record; yet the court held that she had not only the right of use but the right of possession, and that the gift was valid as against his subsequent creditors.¹

138. ACTUAL AND MANUAL DELIVERY.—The adjective “actual” is very frequently used in connection with the word “delivery,” and some confusion has arisen in its use. Thus in a New Hampshire case it is said that “without actual delivery the title does not pass.”² Some confusion has arisen from the use of this word—some writers and courts having construed it to mean a *manual* delivery. But by the phrase “actual delivery” we are not to understand that a manual delivery—the handing in person of the subject-matter of the gift to the donee, or the handing by a third person, at the request of the donor and in the latter’s presence, of such subject-matter to the donee. Such a transaction is not to be understood; but by the use of the phrase nothing more is meant than such a delivery as will pass the title, whether that be a manual or a symbolical delivery. In a few cases, however, we shall see that in a *donatio mortis causa* a manual delivery is required.³

139. ACTUAL, CONSTRUCTIVE, OR SYMBOLICAL DELIVERY.—In some of the older cases, especially in instances of *donationes mortis causa*, it is declared that there must be an actual delivery; but this rule has long since been abrogated. The delivery may be either actual, constructive, or symbolical; and the one is as effectual to pass the title as the other.⁴ In a Texas case it was said:

¹ Pierson v. Heisey, 19 Ia. 114. See Section 169.

² Reed v. Spaulding, 42 N. H., p. 119.

³ Eswein v. Seigling, 2 Hill (S. C.), Ch. 600. The Virginia statute has no reference to gifts *mortis causa*: Thomas v. Lewis, 15 S. E. Rep. 389.

⁴ Devol v. Dye, 123 Ind. 321; Gammon Theological Seminary v. Robbins, 128 Ind. 85; Love v. Francis, 63 Mich. 181; Dickschied v. Exchange Bank, 28 W.

"Where the thing is incapable of actual delivery, or where the situation of the parties, or the circumstances of the case will not admit of it, it may be symbolical or constructive."¹ In an early case in North Carolina a gift, where only a symbolical delivery was made, was upheld. In that case the donor, while in good health said to the donee, a child: "I give you all my corn, and all my hogs, my horse Tinker, and my negro slave. Here, take of the corn I have given you." And he gave him an ear or two of corn. In delivering the opinion of the court, Taylor, J., said: "Where the things given are not present to be delivered, a symbolical delivery is allowable by the law of this country. The horse was in the yard and might have been delivered; and the gift is clearly not good as to him. The corn, hogs, and negro were not there, but two or three miles off. As to them, the delivery of the ear of corn was a good delivery, if delivered in the name of all."² A and B were partners in a brewery, in which a clock, the property of either A or of the partnership, was used. Four months prior to his death A told a witness that he had given the clock to C, and at the request of A the witness went and demanded the clock from B, who said he could not give it on that day, but would in three days after. On other occasions,

Va. 340; *Miller v. Le Piere*, 136 Mass. 20; *Reid v. Colcock*, 1 N. & McC. 592; *Powell v. Leonard*, 9 Fla. 359.

¹ *Hillabrent v. Bower*, 6 Tex. 45; *Arrington v. Arrington*, 1 Hay. 1 (delivery of a dollar instead of the negro given, who was absent in another State; held a valid gift); *Poullain v. Poullain*, 79 Ga. 11.

² We have given the entire opinion: *Lavender v. Pritchard*, 2 Hay. 293. On a second trial the court considered that there was only a delivery of the corn: *Lavender v. Pritchard*, 2 Hay. 337. In *Gardner v. Parker*, 3 Madd. Ch. 102, it was said that *Snellgrove v. Bailey*, 3 Atk. 214, established the proposition that a delivery of a mere symbol in a *donatio mortis causa* was not a sufficient delivery. That there may be a symbolical gift in such an instance, see *Phipps v. Hope*, 16 Ohio St. 586; *Hamor v. Moore*, 8 Ohio St. 239; *Taylor v. Kelly*, 5 Hun, 115.

both before and after the death of A, B promised to give up the clock, but did not do so. Still later he refused to give up it up. It was held that the promise made by B to give up the clock was evidence to go to the jury of his assent to the disposal of the clock, if it were partnership property; and also evidence to show that everything necessary to make a gift effectual had been done by A whether the clock was partnership property or the exclusive property of A.¹

140. THE SITUATION OF THE SUBJECT-MATTER OF THE GIFT MUST BE CONSIDERED.—In determining whether there has been a valid delivery, the situation of the subject of the gift must be considered. Thus if it is actually present, and capable of delivery without serious effort, it is not too much to say that there must be an actual delivery, although the donor need not in person or by agent hand the article to the donee, if the latter assumes the possession. “An actual delivery has never been required, other than such as the nature of the property intended to be transferred was susceptible of.”² “The rule, we think, has been greatly modified by the more modern decisions on the subject. It is that the delivery must be according to the nature of the thing, and usually that means according to the physical nature of the thing to be delivered,

¹ *Malone v. Reynolds*, 2 Fox & Smith (Ir.) 59. Doctrine of constructive delivery recognized: *Stephenson v. King*, 81 Ky. 425. In *Bunn v. Markham*, as reported in Holt's *Nisi Prius*, 352, it was said that in a *donatio mortis causa* there must be an actual delivery of the article where it is capable of delivery, and a symbolical delivery would not be sufficient.

In Alabama, after a review of many cases, the court formulates the following rule: “Delivery, actual or constructive, is essential to the validity or consummation of a parol gift of a chattel; and where the delivery is constructive, it must clearly appear that the donor has parted with his dominion over the thing, in order to pass the title to the donee and affectuate the gift.” *Bates v. Vary*, 40 Ala., p. 434.

² *Gilmore v. Whitesides*, Dudley Eq. 14.

such as the bulk or weight, and does not refer to the locality of the thing.”¹

141. ARTICLE INCAPABLE OF DELIVERY.—So strongly do the early cases insist upon an actual delivery to complete a gift, it was said that if the thing given is incapable of a delivery there can be no gift made of it.² But the modern cases hold that in such an instance if there be some act equivalent to a delivery it is sufficient.³

142. CONDITIONAL DELIVERY.—A gift to be valid must not only be delivered, but the delivery must be uncondi-

¹ *Stephenson v. King*, 81 Ky. 425; 50 Am. Rep. 172; *Devol v. Dye*, 123 Ind. 321. “While a delivery is absolutely necessary to the validity of a gift, yet it is not necessary that there should be a manual delivery of the thing given. It will be sufficient if the delivery be as complete as the thing and the circumstances of the parties will permit. If the article given be too bulky to admit of a manual delivery, but there is a surrender of the possession and control by the donor to the donee, with a clear expression of the intention of the donor to give, and the donee accepts the gift, and assumes control of the property, it will be sufficient.” *Gammon Theological Seminary v. Robbins*, 128 Ind. 85; *Ross v. Draper*, 55 Vt. 404; *Devol v. Dye*, 123 Ind. 321; *Farquharson v. Cave*, 2 Colly. 356; *Reddel v. Dobree*, 10 Sim. 244. A and B, brothers, buried a certain sum of silver, belonging to them equally. B died and C became his executor. Thirteen years afterward A, who was old and unmarried, told C that he wanted his brother D to have his portion of the buried treasure; and that after his death it must be dug up and equally divided between D and himself as executor. A made the same statement and direction to D. Afterward A and C concluded to dig up the treasure, without waiting for the former’s death. They sent for D, and he and C made search for the money, which was in two boxes, but only found one, until A came and pointed out the place of its burial. Both boxes were carried jointly to the house occupied by A and C, near by. Six days after A died, and the day after his burial C and D divided the money equally. It was held that D had a good title to the money, the act of sending him to the place of burial of the money, to dig it up, being a sufficient delivery: *Carradine v. Carradine*, 58 Miss. 236; *Dickeschied v. Exchange Bank*, 28 W. Va. 340; *Hitch v. Davis*, 3 Md. Ch. 266; *Powell v. Leonard*, 9 Fla. 359; *Beaver v. Beaver*, 117 N. Y. 421; *McKenzie v. Harrison*, 120 N. Y. 260; *Porter v. Gardner*, 60 Hun, 571; *Miller v. Neff* 33 W. Va. 197. For a delivery of colts pastured on the farm of the donor but which was occupied by the donee, see *Porter v. Gardner*, 60 Hun, 571.

² *Pennington v. Gittings*, 2 G. & J. 208; *Adams v. Hayes*, 2 Ired. L. 361.

³ *Deppe v. People*, 9 Bradw. 349. See *Cochrane v. Moore*, 25 Q. B. Div. 57; S. C. 59 L. J. Q. B. 377; 63 L. T. 153; 38 W. R. 588; 54 J. P. 804; 6 T. L. R. 296.

tional. It must "be delivered absolutely and unconditionally." Thus where the donor enlisted in the military service during the war of the Rebellion, and a short time before starting for the army, in which he died, said to a friend, in regard to a gun which he had loaned that friend, "Well, if I never return, you may keep the gun as a present from me;" it was held that these facts made neither a gift *inter vivos* nor *mortis causa*.¹

143. TIME OF DELIVERY.—It is not essential that a delivery be made at the time the words of gift are used, or, in other words, at the time the gift is made. If the article given is already in the possession of the donee, then no delivery is necessary; so the delivery may follow at any time before the death of the donor,² and before he revokes the gift.³ But this rule has been vigorously denied in the case of a *donatio mortis causa*, and a delivery required at the very time of making the gift. Indeed, the weight of authority may be said to still follow the rule requiring an actual and present delivery.⁴

144. FUTURE DELIVERY.—A delivery to pass the title in the future is ineffectual, as much so as if there had been no attempt to make a delivery. Thus, if the property is delivered to a third person, with instructions to deliver it to the intended donee upon the happening of a future event, and in the meanwhile the donor retain con-

¹Smith v. Dorsey, 38 Ind. 451.

²Dupuy v. Dupont, 11 La. Ann. 226.

³Carradine v. Carradine, 58 Miss. 286; Wing v. Merchant, 57 Me. 383; Gillespie v. Burleson, 28 Ala. 551; Evans v. Lipscomb, 31 Ga. 71, qualifying Anderson v. Baker, 1 Ga. 595; Grant v. Grant, 34 Beav. 623; S. C. 34 L. J. Ch. 641; 11 Jur. N. S. 787; 13 L. T. 721; 13 W. R. 1057; Alderson v. Peel, 64 L. T. 645; S. C. 7 T. L. R. 418.

⁴Dicheschied v. Exchange Bank, 28 W. Va. 340. Proof of possession merely is no proof of the time of delivery: Cole v. Lucas, 2 La. Ann. 946.

trol over the gift, the gift is ineffectual.¹ Of course, in the instance of a gift *mortis causa*, the statement is not strictly true; for there the donor may at any time revoke the gift, and to this extent the donee is the agent of the donor. In such an instance, on the request or command of the donor, the bailee may with perfect safety redeliver the property to the donor without incurring any liability to the donee. But where at the time a note for money loaned was executed, payable three years after date, with interest payable annually, the payee executed and delivered to the payor a writing stipulating that, if the payee should not collect the note in her lifetime, her representatives should surrender it to the payor, adding "as I intend it as a gift from me to him," and the payee retained the possession of the note during her lifetime, but died within a year after the execution of the writings, it was considered that there was no valid gift, for the reason that there had been no delivery, and the writing she executed only contained a promise to give.² So, where the payee of a note placed it in the hands of a third party and directed the maker to pay it to such third party on the payee's decease, it was held that there was no gift, even if such third person retained it until the payee's death.³ But where a testator directed his executor to draw a sum of money from his bank and divide it among his servants according to directions given, and the executor obtained the money, notified both the testator and the servants of the fact, but delayed payment until the death of the former, it was held that there was a valid gift.⁴ Yet

¹ *Devol v. Dye*, 123 Ind. 321; *Walker v. Crews*, 73 Ala. 412; *Knott v. Hogan*, 4 Met. (Ky.) 99. If the gift is in writing, with all the formalities of a will, it may be probated as a will, and the gift will be valid: *Bonnafee v. Bonnafee*, Manning (La.), 329; *Phipps v. Hope*, 16 Ohio St. 586; *Horn v. Gartman*, 1 Fla. 63.

² *Knott v. Hogan*, 4 Met. (Ky.) 99; *Trough's Estate*, 75 Pa. St. 115.

³ *Craig v. Kittredge*, 46 N. H. 57; *Sims v. Walker*, 8 Humph. 502.

⁴ *Barclay's Estate*, 2 W. N. C. 447; S. C. 33 Leg. Int. 108. See *Richardson v. SeEVERS*, 84 Va. 259.

where the donor handed to B, a few days before his death and while in good health, a box with a letter addressed to C, and requested B to forward the box to C "in case anything should happen" to him, the donor, and in a few days thereafter the donor committed suicide, whereupon B delivered the box, with its contents and the letter, to C, it was held that there was not a valid gift.¹

145. THE CONDITION AND INTENTION OF THE DONOR MUST BE CONSIDERED—ARBITRARY ENFORCEMENT OF THE RULE.—Not only is the application of the rule requiring a delivery to be mitigated and applied according to the situation of the subject of the gift, but the conditions and intention of the donor at the time of making the gift must be considered; and this is especially true of a gift *mortis causa*. "The intention of the donor," says the Supreme Court of Indiana, "in peril of death, when clearly ascertained and fairly consummated, within the meaning of well-established rules, is not to be thwarted by a narrow and illiberal construction of what may have been intended for and deemed by him a sufficient delivery. The rule which requires delivery of the subject of the gift is not to be enforced arbitrarily."² Thus where the donor lived alone and when taken very ill wrote on a slate that she desired the donee to have all her personal property, and of her intention there was no doubt; and the slate was found by her bedside at the time she was discovered dead; it was held that, as she had done all that was possible for her to

¹ Earle v. Botsford, 23 N. B. 407. Gift not to take effect until after death; not valid: Basket v. Hassell, 107 U. S. 602; Daniel v. Smith, 75 Cal. 548; S. C. 64 Cal. 346; Trough's Estate, 75 Pa. St. 115. Mortgage to be cancelled when donor dies: Scales v. Maude, 6 DeG., M. & G. 43; S. C. 25 L. J. Ch. 433; 1 Jur. N. S. 1147.

² Devol v. Dye, 123 Ind. 321; Gammon Theological Seminary v. Robbins, 128 Ind. 85; Delmotte v. Taylor, 1 Redf. 417; Duffell v. Noble, 14 Tex. 640; Jackson v. Street Rule, 88 N. Y. 520 (reversing 15 J. & S. 85); Bigelow v. Paton, 4 Mich. 170.

do to effect a delivery, an actual delivery of the slate was not necessary.¹

146. DECLARATIONS OF DONOR INSUFFICIENT TO SHOW A DELIVERY.—Where the donor remains in possession, or it is not shown that the gift was ever in the possession of the donee or in the possession of some person for him, his declarations, however often repeated, that he had made the gift will be unavailing to support the averment of a gift. Such declarations cannot take the place of a delivery.²

147. DONOR BELIEVING THAT A FURTHER ACT WAS NECESSARY TO COMPLETE GIFT.—If the conduct of the donor is such as to show that he considers that the performance of some further act is necessary in order to complete the gift, then until that act is performed, or until he makes it manifest that he does not consider its performance as necessary in order to perfect the gift, the gift is not completed. This is especially true where the transaction is involved in some ambiguity or uncertainty, especially with reference to the delivery. In all such instances it is clear that the donor considers that he has dominion over the property, and that he has not parted with his title to it—that he is yet under a promise to make the gift. These statements finds support in an early English case. In that case A died intestate, the owner of personal property and entitled to bank annuities in a trustee's name, the dividends being payable to B. C, one of A's heirs, addressed a letter to B, and after mentioning the intestate's property, said "my share I shall

¹ *Ellis v. Lacor*, 31 Mich. 185; S. C. 18 Amer. Rep. 178.

² *Anderson v. Baker*, 1 Ga. 595; *Wyche v. Greene*, 11 Ga. 159; *Hansell v. Bryan*, 19 Ga. 167; *Fulton v. Fulton*, 48 Barb. 581; *Hunter v. Hunter*, 19 Barb. 631; *Huntington v. Gilmore*, 14 Barb. 243; *Kintzel v. Kintzel*, 133 Pa. St. 71; *Backer v. Meyer*, 43 Fed. Rep. 702. See Sections 224, 225.

relinquish to you for your benefit only." A deed of release and assignment from C to B, of all of C's interest in A's effects was afterward by C's direction prepared for his execution, but never executed, C having died the day before that on which he had directed his solicitor and a witness to attend him to attest the execution of the release ; but having joined with B and the other heirs of A in executing a release to the trustee of the bank annuities on the trustees transferring them to B, it was held that as to the several personal estates there was no valid gift to B, but as to the bank annuities and their produce there was a valid gift. "It is sufficient to say," said the Master of the Rolls, "that in the present case there was not a complete act. A further act was intended, but never actually completed."¹

148. ACT OF DELIVERY SLIGHT OR AMBIGUOUS BUT INTENT AND BELIEF OF DONOR CLEAR.—If the language used by the donor is clear and unambiguous, showing a clear intent to make the gift and a belief on his part that he had done all that was necessary to complete it, then the act of delivery if slight and ambiguous will be aided thereby, not, however, dispensing with an actual delivery ; but rendering the gift valid where it would be deemed invalid if the acts of delivery were uncertain or ambiguous. So if there is a clear act of delivery, accompanied by words of a gift of a somewhat doubtful import, the act of delivery may be resorted to, to determine the intent the alleged donor had in his mind when he made the delivery and used the language attributed to him. Or, in other words, a good delivery may aid doubtful words of gift ; and unambiguous acts of delivery may be aided by clear words of gift.²

¹ Hooper v. Goodwin, Wils. Ch. 212 ; Rupert v. Johnston, 40 Q. B. (Can.) 11.

² Fearing v. Jones, 149 Mass. 12 ; Anderson v. Baker, 1 Ga. 595.

149. BARON POLLOCK'S DECISION.—As late as 1883, an attempt to modify the stiff and inflexible rule requiring a delivery, was made in England. Baron Pollock, after an extended discussion of the rule with respect to a delivery, declared the true rule of the law to be this: "The question to be determined is not whether there has been an actual handing over of property manually, but whether, looking at all the surrounding circumstances of the case, and looking particularly at the nature and character of the chattel which is proposed to be given, there has or has not been a clear intention expressed on the part of the donor to give, and a clear intention on the part of the recipient to receive and act upon such gift." And although this is a mere dictum, he declared that "whenever such a case should arise again" he was "confident that that would be the basis of the decision of a court of common law, and, of course, the same result would follow in a court of equity." In this instance he was referring to a gift *inter vivos*.¹ The court held that the posting of a piece of paper, with the donee's name and a date written on it, signed by the donor in her own writing, upon a picture in the donor's house, where the donee, her sister, frequently visited, was not of itself enough to show a gift—not because of lack of delivery, but because there was nothing to show an intention to give the picture. But as to a silver sugar-bowl, a dessert service, and some old Chelsea dishes and plates, it was held that a declaration of a gift in the presence and to the donee, and the handing over to such donee one dish in the name of the whole, was a sufficient delivery, although none of the articles were removed from the house of the donor. Seven years later,

¹ Danby v. Tucker, 31 W. R. 578, following a dictum in Ward v. Andlord, 16 M. & W. 862, 871.

the rule announced by Baron Pollock was overturned by the Queen's Bench, in a lengthy opinion by Justice Fry, in which the court adhered to the case of *Irons v. Smallpiece*,¹ and declared that it had not been overruled by the decision of Baron Pollock. The case is an exhaustive review of all the modern and old English cases and firmly settles the rule that a delivery is essential. There it is held that the gift of a chattel capable of delivery, made *per verba de presenti* by a donor to a donee, and assented to by the donee, whose assent is communicated to the donor, does not pass the property in the chattel without delivery.²

150. DELIVERY BY WAY OF BAILMENT.—If the delivery amounts only to a bailment, then the gift is incomplete; for there is no unconditional delivery. Thus where a father in his last illness placed a package of money in the possession of his son to take care of, and some few days afterward directed him, in case he should not get well, to take the money and, after paying the funeral and other designated expenses, to divide the remainder equally between himself and his brothers and sisters, it was held that the delivery was made by way of bailment and not in execution or contemplation of a gift, and that there was no *donatio mortis causa*.³

151. DONEE UNAWARE OF THING GIVEN, ALTHOUGH HE KNOWS THAT SOMETHING OF VALUE IS PRESENTED.—It is not necessary that the donee, at the time of the delivery or even at any time before the death of the donor, should know what was given. Thus where the donor sealed up a note in an envelope and delivered it to the

¹ 2 B. & A. 551.

² *Cochrane v. Moore*, 25 Q. B. Div. 57; S. C. 59 L. J. Q. B. 377; 63 L. T. 153; 38 W. R. 588; 54 J. P. 804; 6 T. L. R. 296.

³ *McCord v. McCord*, 77 Mo. 166.

donee, saying to her that it contained a gift for her, but requesting that it be not opened until after his death, the gift was held valid, although the donee did not know what the gift was until she opened the envelope.¹ So where a testator made a will, and included in it £100 for his executors, in whose hands he placed the will; and subsequently made a fresh will, but kept the former, and directed it to the first executor, saying it contained something for him, the two transactions occurring in his last sickness where the testator was in hourly expectation of death, the gift was upheld as a *donatio mortis causa*.²

152. DONEE IN POSSESSION AT TIME OF GIFT.—If the donee has possession at the time of the gift, having obtained such possession either lawfully or unlawfully at some time previous thereto, the law does not require him to first deliver the subject-matter of the gift to the donor and then the donor redeliver it to the donee. Such a transaction would be a useless formality.³ Thus, where a wife told her husband, on her death-bed, that he might have a note she owned and which was then in a bureau drawer in the house they jointly occupied, and the note remained in the drawer until after her death, the gift was upheld; because it was in his house and presumptively accessible to him.⁴ A donee had possession of a barge, and he used it as a servant of the owner. The owner gave it to him, and thereafter the donee used it as his own, pay-

see
§ 14.

¹ Worth v. Case, 42 N. Y. 362. See Wadd v. Hazleton, 62 Hun, 602.

² Hill v. Chapman, 2 Bro. C. C. 612.

³ Providence Institute, etc., v. Taft, 14 R. I. 502; Wing v. Merchant, 57 Me. 383; Frame v. Frame, 32 W. Va. 463; Carradine v. Carradine, 58 Miss. 286; Porter v. Gardner, 60 Hun, 571; Tenbrook v. Brown, 17 Ind. 410; Alderson v. Peel, 64 L. T. 645; S. C. 7 T. L. Rep. 418; Waring v. Edmonds, 11 Md. 424; Penfield v. Thayer, 2 E. D. Smith, 305; Roberts v. Roberts, 15 W. R. 117; Champney v. Blanchard, 39 N. Y. 111; Esswein v. Seigling, 2 Hill (S. C.), Ch. 600.

⁴ Stevens v. Stevens, 2 Hun, 470; Williams v. Fitch, 18 N. Y. 546.

ing the wages of the crew. The gift was deemed valid.¹ But all the courts have not acquiesced in the rule that a delivery is unnecessary when the article given is in the hands of the donee, especially in the case of gifts *mortis causa*. In Maine it was said that such a delivery was not effectual in the instance of the latter kind of gifts. "It is the opinion of the court," said Walton, J., "that the gift of a savings-bank book, *causa mortis*, to be valid must be accompanied by an actual delivery of the book from the donor to the donee, or to some one for the donee; and that the delivery must be made for the express purpose of consummating the gift; and that a previous and continuing possession by the donee is not sufficient."² The same court extended the rule to a gift *inter vivos* between husband and wife.³ So where A gave B his earnings to deposit in a savings bank, and B deposited them from time to time, under an entry, both in the deposit book and in the bank ledger, "B, trustee of A;" and A occasionally took the deposit book for the purpose of making a deposit, but always returned it to B; and on one of these visits he said to the bank officials, "This deposit is payable to B in case of my death," to which the treasurer replied, "She has the control during your life, but it is not payable to her after your death," and then A said, "Then make it so;" whereupon the bank treasurer added to the entries in the ledger and deposit book the words, "Payable, also to B in case of death of A;" and these entries remained without further change to the time of A's death, it was held that the gift was not valid either as a gift *inter vivos* or *mortis causa*, for the reason that there was no intent to

¹ *Winter v. Winter*, 101 E. C. L. 997; S. C. 4 L. T. (N. S.) 639; 9 W. R. 747.

² *Drew v. Hagerty*, 81 Me. 231, 243. Where the delivery and the alleged act of gift are simultaneous, the intent to give must accompany the delivery: *Beaver v. Beaver*, 117 N. Y. 421.

³ *Lane v. Lane*, 76 Me. 521.

make an immediate gift, and that it was not good as a *donatio mortis causa*, because not made in the last illness of the donor.¹ In Virginia, the rule with reference to a *donatio mortis causa* is drawn very close. In such an instance it is held that there must be an actual delivery of the thing itself, or of the means of getting possession and enjoyment of the thing; or if the thing be inactive, of the instrument by using which the share is to be reduced to possession. It is also held that it is not the possession of the donee, but the delivery to him by the donor, which is material; and that an after-acquired possession of the donee is nothing, and a previous and continuing possession, though by the authority of the donor, is no better.²

153. FORGIVING DEBT.—A debt due from the donee to the donor is the subject of a gift. If this debt is evidenced by a note or other instrument of writing, the delivery of the note or instrument, with intent to make a gift of the debt, will be a sufficient delivery.³ So a delivery of a receipt instead of the instrument itself will be sufficient, especially if there is some reason why the instrument cannot then be delivered. Thus a mother holding

¹ *Parcher v. Saco, etc.*, Institution, 78 Me. 470.

² *Miller v. Jeffress*, 4 Gratt. 472; *Yancey v. Field*, 85 Va. 756. The same rule is adopted in New Hampshire: *Cutting v. Gilman*, 41 N. H. 147; *Egerton v. Egerton*, 17 N. J. Eq. 419; *Walsh's Appeal*, 122 Pa. St. 177; S. C. 1 L. R. Am. 535; *Kenney v. Public*, 2 Bradf. 319; *Dickeschied v. Exchange Bank*, 28 W. Va. 340. A was executor of an estate, and as such in possession of it. The heirs wrote to him to retain one thousand dollars for the extraordinary trouble he had had, which he did. It was held that this was a valid gift: *Esswein v. Seigling*, 2 Hill (S. C.), Ch. 600. In North Carolina it was held that a gift of negroes to a donee already in possession was void unless there was some distinct act of delivery: *Adams v. Hayes*, 2 Ired. L. 361. Merely showing possession is no showing as to the time of delivery: *Cole v. Lucas*, 2 La. Ann. 946, unless the gift is a note either indorsed to the donee or in blank: *Breier v. Weier*, 23 Ill. App. 386.

³ See *Brinckerhoff v. Lawrence*, 2 Sandf. Ch. 400. A retention of the bond without cancellation is not a gift: *Nelson v. Cartmel*, 6 Dana, 8; *Young v. Power*, 41 Miss. 197.

her son's note secured by mortgage gave him a receipt for one year's interest, with the intent and understanding that it was a gift, and she also indorsed over a similar receipt on the mortgage; this was held to be a valid gift of the interest.¹ So the mere indorsement of payments upon the mortgage, with intent that the amount indorsed shall operate as a gift to the extent of the credit, is a sufficient delivery.² But if the parties consider, and so act, that a delivery of the instrument evidencing the debt must be delivered in order to complete the gift, then a delivery of that instrument is requisite, and no words or other acts will be sufficient to uphold as a gift what was nothing more than a mere intention. Thus a father held his daughter's note for money advanced to purchase an estate. At the time she purchased the estate he used some expressions showing his intention to give her the amount of the sum advanced to her, but he soon after took her note payable seven days after date. She regularly settled the interest falling due during his life. Fifteen years after the execution of the note, the father indorsed on it as follows: "I direct that this promissory note be delivered up to be cancelled after my death, to the intent that my daughter shall be exonerated from payment of same." This memorandum was dated and signed with the father's initials, and was in his handwriting. It was also attested by one witness. It was also shown that at various times the father told his daughter to take possession of the note, particularly so in his first illness. This note, with the conveyance securing it, he kept in his deed box, and they were labeled, "These belong to H. C.," his daughter.

¹ *Travis v. Travis*, 8 Ontario, 516; affirmed 12 Ontario App. 438. See where a receipt operated as a *donatio mortis causa* of the debt: *Moore v. Darton*, 4 De. G. & Sm. 517.

² *Green v. Langdon*, 23 Mich. 221; *Lewis' Est.*, 139 Pa. St. 640; but see *Buswell v. Fuller*, 31 N. E. Rep. 294.

Recovering from his first illness, he was fatally stricken down in the same year a few months afterward; but during this last illness he said nothing concerning the note. About an hour before his death, when he was insensible, his daughter got the key to the deed box, and found therein the note and conveyance, securing it, and on reading the instrument she replaced them in the box. It was held that these facts did not show a gift, either *inter vivos* nor *mortis causa*, nor by will, because there was not the requisite number of witnesses.¹

154. GIFT OF A PART OF A DEBT—IMPOSSIBLE TO MAKE A DELIVERY.—If a donor desire only to forgive a part of the debt held against the donee, then he is not required to deliver up the instrument evidencing the debt, and thus lose his right of a superior proof of his claim. Thus, where the donor held the note and mortgage of the donees, and, desiring to cancel a part of the debt and make them a present of it, he, in the presence of one of them, indorsed the amount he desired to cancel, which was less than the whole debt, upon the note and mortgage

¹ *Cross v. Cross*, 1 Irish Eq. 389 (1877). The court quotes the following language: "I think the cases go farther, to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the court will not give effect to it by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust:" *Milroy v. Lord*, 4 De. G., F. & J. 264, 274. Letters written by a mortgagee to the mortgagor declaring that "I now give this gift, to become due at my death, unconnected with my will; and I hereby request and direct my executors to cancel the mortgage deed," do not operate as a gift: *Scales v. Maude*, 6 De G., M. & G. 43; S. C. 25 L. J. Ch. 433; 1 Jur. N. S. 1147. Forgiving interest on note: *Lewis' Estate*, 139 Pa. St. 640. There is a palpable distinction between the forgiving a part of a debt as a gift, and the acceptance in payment in full of less than the amount due. The one is binding, the other may not be according to the circumstances of the debtor or the transaction: *McKenzie v. Harrison*, 120 N. Y. 260.

When the donor, supposing he was about to die, destroyed a bond he held against his debtor, as a gift of the indebtedness to him, but recovered: it was held that there was no gift: *Rowe v. Marchant*, 86 Va. 177.

and the donee present agreed to the cancellation, it was held that the gift, as to so much of the debt as was cancelled, was valid as to both donees, and that a receipt in writing for the amount cancelled was unnecessary. "As the debt," said the court, "which was the subject of the gift, when considered with reference to the fact that the donee was the debtor and that only part of the debt was attempted to be given, did not admit of actual delivery, and as all was done that could well be done, under the circumstances, to render the gift effectual, we do not think the act and intention of the donor should be defeated merely because the subject did not admit of an actual or technical delivery."¹ So, where the payee indorsed upon the note a year's interest as a gift, that alone was held to make the transaction a valid gift of that year's interest.² By the terms of a mortgage the debt secured was "to be paid by the mortgagor to the mortgagee when called on by said mortgagee, and the said mortgagor does not agree to pay the sum to no [any] one else except said mortgagee." The mortgagee never made a demand for the money, and died. It was held that by his death the consideration of the mortgage became a gift to the mortgagor.³

155. GIFT OF PART OF ARTICLE.—In 1890, by the Court of Queen's Bench, it was decided that a gift of an

¹ *Green v. Langdon*, 28 Mich. 221. The court was ready to admit that, if a gift consists of tangible personal property, which admits of a delivery, there must be one; "and the same rule would probably apply where the note or bond of a third person is the subject of the gift. Whether, if the whole mortgage debt, in the present case, had been the subject, delivery of the note and mortgage, or one of them, would not have been essential to the validity, we need not inquire." See, on this exact point, *Cochrane v. Moore*, 25 Q. B. Div. 57; S. C. 59 L. J. Q. B. 377; 63 L. T. 153; 38 W. R. 588; 54 J. P. 804; 6 T. L. R. 296. See *Wetmore v. Brooks*, 18 N. Y. Supp. 852: a retention on condition that part be applied to donor's debts rendered gift void.

² *Travis v. Travis*, 8 Ont. 516; affirmed on appeal, 12 Ont. App. 438.

³ *Sebrell v. Couch*, 55 Ind. 122. There was no other evidence than the mortgage.

interest in an article, as one undivided fourth part of a horse, was invalid unless there was a delivery to the donee. In this case the parties resided in England and the horse was in France. The owner in England there, face to face, gave the donee one undivided fourth part of the horse. A few days after, he wrote to the trainer having the horse in charge, and in whose stables it was, and told him of the gift; but he did not inform the donee that he had so written to the trainer. These facts were held not to constitute a valid gift as against a subsequent creditor of the donor.¹ The court at great length discusses the question whether a delivery is requisite to render a gift valid, but seems to have overlooked, at least in the opinion, that the gift was only a part of an article; and to require the donor to yield up the possession of the horse to the donee was to require him to part with the possession of an animal when his interest was three times as great as that of the donee.²

156. DELIVERY OF ACCOUNT OWED BY DONEE TO DONOR.—If the donee be indebted to the donor, the latter may make him a present of such indebtedness. Such a transaction is nothing more than a forgiving of the debt. If such indebtedness be evidenced by a writing, a delivery up of such writing will be sufficient, especially if cancelled by the donor; and if it be only an account, then delivering to the donee a statement in writing that the indebtedness is cancelled will be sufficient if properly accepted.³ This would be nothing more than a receipt. But suppose the account is entered at length in the account-books of the donor, and he cancels the account

¹ *Cochrane v. Moore*, 25 Q. B. Div. 57; S. C. 59 L. J. Q. B. 377; 63 L. T. 155; 38 W. R. 588; 54 J. P. 804; 6 T. L. R. 296; *Clock v. Chadeagne*, 10 Hun. 97.

² The gift of an undivided part may be affected by a deed: *Ham v. Van Orden*, 84 N. Y. 257.

³ *Champney v. Blanchard*, 39 N. Y. 111; *Young v. Power*, 41 Miss. 197.

with the intent to make it a gift to the donee, and all the other formal parts of a gift are executed, except some formal act of delivery; would the cancellation of the account be a delivery? We think it would, if the proof of intent to give was clearly and uncontradictorily made out.¹ In a Tennessee case it was shown that the donor intended to give a note to his father which he held against him by inserting a provision in his will to that effect, but the scrivener who drew the will, told him that was not necessary, and that he might make the gift by declaring his intention on the back of the note, which he did, retaining the note in his possession. The note was never delivered to the father, but the son directed his wife, the residuary legatee, that after his death it be given to him, and she so acted as to lead him to believe that she had promised to do so. It was held that a court of equity would perpetually enjoin its collection.²

157. ARTICLE GIVEN NOT PRESENT AT TIME AND PLACE OF GIFT.—The fact that the article given is not at the place where the words of gift are uttered does not dispense with a delivery. This is true of a gift *mortis causa*. Thus where a donor attempted to give a bank-deposit to the donee, and her bank-book was in the possession of her agent in another State, the gift was held invalid, although she was then in full expectation of almost immediate death.³

¹ Deppe v. People, 9 Bradw. 349; Young v. Power, 41 Miss. 197.

² Richardson v. Adams, 10 Yerg. 273. See Sims v. Walker, 8 Humph. 502, where the preceding case is distinguished, and a promise by one who had no interest in the matter was held not to create a trust, as was held in the first case.

Gift of dower by owner cannot be proved by casual declarations: Kintzel v. Kintzel, 133 Pa. St. 71. See Section 279.

Where a father loaned his sons a sum of money and so charged it on his books; and afterward he transferred the debt to the credit side of the ledger, with intent to make a gift of the sum, the gift was held valid: Albert v. Albert, 74 Md. 526.

³ Case v. Dennison, 9 R. I. 83; Roberts v. Wills, Spencer (N. J.), 591; Dunbar v. Dunbar, 80 Me. 152.

But where the note was in the hands of the donor's agent, and was not present, a direction from the donor to this agent to give it to the donee in pursuance of his design to make a present of it was held to be a sufficient delivery.¹ Where, however, no direction was given by the donor to her agent to deliver the note to the donee, although full words of formal gift were used, addressed to the donee, the gift was held invalid.² So where the donor, a few days before his death and in his last sickness, conveyed to his sister a farm on which she and her husband then and had resided for several years, and at the same time told her there was personal property on the farm, excepting some of it for himself, that would be of no service to him, but might be to her, and said: "I will give it to you," the farm and the property on it being fifteen miles away; it was decided that there was no gift either *inter vivos* or *mortis causa*.³

158. DELIVERY OF KEY TO CHEST OR DRAWER.—The delivery of a key to a chest with words of gift of the chest, is a sufficient delivery.⁴ In the case just cited the donor handed to the donee certain keys and said: "I give you the chest that is over at Sergeant Rowe's, and all that is in it." This was while the donor was sick abed; and a week afterward he died. At his death the administrator of the donor took possession of the trunk and its contents, the donee never having received actual possession of it. It was held that this was a valid gift.

¹ *Southerland v. Southerland*, 5 Bush 591. Delivery was not actually made to the donee until after the donor's death: *Contra*, *Picot v. Sanderson*, 1 Dev. L. 309; *Waring v. Edmonds*, 11 Md. 424.

² *Stevens v. Steven*, 2 Hun, 470.

³ *Huntington v. Gilmore*, 14 Barb. 243. See, also, a similar case of delivery of a cow: *Brink v. Gould*, 43 How. Pr. 289; and a colt on the farm: *Porter v. Gardner*, 60 Hun, 571.

⁴ *Marsh v. Fuller*, 18 N. H. 360.

The delivery of the key was held a sufficient delivery of the property, not as a symbolical delivery, but because it was the means of obtaining possession.¹ Thus A lodged at B's house, and had furniture and plate there in his separate room. He declared that he gave to B's wife everything in his room, but there was no actual delivery, except that he gave her the key when he went out of town. While once thus out of town he died. It was held that there was a sufficient delivery and a valid gift.² A great many cases contain *dicta* that the delivery of a key to a chest, trunk, or drawer may be sufficient; but there are not many instances in which such a delivery has been upheld, there nearly always being some other essential part of a valid gift left unperformed.³ Thus a payee of sealed notes, ten days before his death, said to a third person that he did not want the maker to pay them. Within forty-eight hours of his death, while confined to his bed and expecting to die, he told the maker that the notes were his, that they were in a drawer in another room, that the key of the drawer was in a secretary in the room where he lay, and told him to get the notes. After the maker's departure the payee told his housekeeper that he had given the maker the notes. The maker was appointed the executor, by his will, of the payee, who disposed of all his property except these notes, and no reference was made to them in the will. Four or five days after the payee's death, the donee took possession of the notes; but the gift was held invalid, for lack of a delivery.⁴ A donor in his last sickness called for his trunk,

¹ Coleman v. Parker, 114 Mass. 30; Sheegog v. Perkins, 4 Baxt. 273. So where donee already had the keys: Taylor v. Taylor, 56 L. J. Ch. 597.

² Smith v. Smith, 2 Str. 955.

³ Dicta. McEwen v. Troost, 1 Sneed, 185.

⁴ Horner's Appeal, 2 Penny. 289. See, also, Somerville's Est., 2 Connelly, 86; S. C. 20 N. Y. Supp. 76.

which was brought to him and put on a table. He opened it, and in the presence of the donee, with aid of a third person, counted out certain amounts of money and bonds, and declared he gave them to the donee. The donor then put the money and bonds back in the trunk, and his assistant took and put it in a closet in the donor's room, occupied exclusively by him. When the donor locked the trunk he gave the key to his assistant and said that he wanted him to keep it for the donee. The assistant retained the key. It was held that this did not show a valid delivery.¹ A donor *in extremis* caused India bonds, bank notes, and money to be brought to him from his iron chest and laid on his bed; he then caused them to be sealed up in three parcels, and the amounts and names of the donees written on them. He then delivered them to his son, and charged him to deliver them to the donees as designated; and then directed him to replace them in the chest, which was done. Afterward the donor delivered to one of the donees the key to the chest, and charged her to keep it, telling her that the contents of the chest were to be hers and the other donees. Several times afterward he spoke of the gifts and who were the donees; but on learning that his son had obtained possession of the key, he expressed great displeasure and caused it to be put in a basket, with other keys, then in his bedroom. Thus things remained until his death. It was held that the gift was invalid because the donor had resumed the possession.² In this case the key was returned to the donor; so where the donor delivered his dressing case key to A and told him to give B the contents after his death, the gift was held invalid, although A made the delivery after the donor's death as directed.³ Where the

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possession

¹ Hatch v. Atkinson, 56 Me. 324; Delmotte v. Taylor, 1 Redf. 417.

² Bunn v. Markham, 7 Taunt. 224; S. C. 2 Marsh, 532; Holt, N. P. 352.

³ Powell v. Hellicar, 26 Beav. 261.

donor told his daughter that his notes were "in a little box on the bureau there; I want you to take them and divide them equally among your children;" and he told her to get the key to the box, and she did and tried to see if it would fit, and it did; and she then delivered the key to her husband who retained it until the donor's death, it was held that there was no delivery.¹ So taking the key of a trunk from the place where it is kept, and the putting of goods into the trunk and returning the key to its place, at the request of the owner in his last sickness, apprehending death and expressing the desire to make a gift of the trunk and contents *mortis causa*, is not a delivery sufficient for that purpose.² A donor delivered to B a locked ash box, and told her to go at his death to his son for the key; and that the box contained money for herself, and entirely at her disposal when he was dead, but that he should want it every three months whilst he lived. The box was twice delivered to the donor by his desire, and he delivered it again to B, and it remained in her possession at his death. On the donor's death B broke open the box, the son having refused to give her the key, and found a check drawn by C in favor of the donor, and inclosed in a cover indorsed with her name. All this time the son kept the key. It was held that there

¹ *Gano v. Fisk*, 43 Ohio St. 462.

² *Coleman v. Parker*, 114 Mass. 30. In Nova Scotia it was held that the delivery of the key of a chest containing money, with the expression "all the money in that chest I give you," is not a sufficient delivery: *Estate of Hartman*, 2 Thom. 62. See *Travis v. Travis*, 12 Ont. App. 438; S. C. affirming 8 Ont. 516. A testator during his last illness handed to his wife the key of a box containing papers, together with a promissory note for \$400, which he intended to give her, but the box and its contents remained as much in the possession of the testator as before the alleged gift; and the note, with the papers, came to the executor's hands. It was held that there was no gift: *Young v. Derenzy*, 26 Gr. (Ch.) 509; *Farquharson v. Cave*, 2 Colly. 355. Delivery of the box, but retaining the key, will not be a sufficient delivery: *Warriner v. Rogers*, 42 L. J. Ch. 581; 16 L. R. Eq. 340; 21 W. R. 766; 28 L. T. N. S. 863.

was no delivery, no relinquishment of dominion over the box, and that the son was the agent of the donor.¹ A father gave his daughter the furniture in his rooms, the keys to which were given her by her husband, and she subsequently removed the furniture to her residence, though it did not appear that she took possession of it with her father's knowledge and assent. It was held that there was not a sufficient delivery, a mere taking possession without the donor's knowledge not being sufficient.² A donor had been confined to her room for twenty years, and the last six years to her bed. The donee had lived with and taken care of her for twenty-seven years. In the room the donor kept a bureau and trunks containing silver coin and jewelry. Six weeks before she died she handed to the donee the keys of the bureau and trunk, and said: "Mary, here are these keys; I give them to you; they are the keys of my trunk and bureau; take them and keep them, and take good care of them; all my property, and everything, I give to you; you have been a good girl to me, and be so still. . . . You know I have given it all to you, take whatever you please; it is all yours, but take good care of it." Neither the trunks, the bureau, nor their contents were removed by the donee nor even handled. The gift was upheld, the donee having the means of assuming the absolute control of the articles given at her pleasure being a sufficient delivery.³ But where bonds were found in a box at the donor's house, indorsed "These bonds belong to and are" the donee's property, signed by the donor; and the donee was the donor's housekeeper, and had the key to the box before his death, and retained it; it was held that there was no gift.⁴

¹ Reddel v. Dobree, 10 Sim. 244.

² Delmotte v. Taylor, 1 Redf. 417.

³ Cooper v. Burr, 45 Barb. 9.

⁴ Trimmer v. Darby, 25 L. J. Ch. 424.

159. DELIVERY OF KEY OF BOX IN DONOR'S BANK—SEPARATION OF AMOUNT OF MONEY GIVEN FROM BULK.—A donor went abroad for his health, and on his return died within four days. He was an invalid when he went abroad, and returned because of his sickness. Before going abroad he delivered the keys of his tin box and private drawer in a safe, which were in the bank of which he was president, to the cashier, with whom they remained until after his death. After his return, fully apprised of his precarious condition, he declared to the cashier his intention to give the donee \$5,000, either in cash or bank stock, and said that he had put \$2,000 in gold in a bag and marked the donee's name upon it, and left it in the tin box in the bank's vault. He directed the cashier to go to the bank and count out \$3,000 more in gold coin, and put it in a sack and mark it as the other sack was marked ; and directed that, in case of his death, the sacks should be delivered to the donee. The cashier counted the gold coin out of the tin box, placed it in sacks, and marked it as directed, after which he informed the donor that his instructions had been carried out, to which he replied approvingly. The sacks containing the coin remained in the tin box and the drawer until the donor's death, the cashier still retaining the keys. At the time of the donor's death the tin box was found to contain, in addition to other large sums of money, a sack containing \$2,000, marked in the handwriting of the donor as follows: "\$2,000. This belongs to P. G. Dye. 11-15-1886." Dye was the donee. There was also a package of \$1,000 in currency, counted out in the same way for another donee, and put in an envelope, marked, and deposited in the tin box. These were held valid gifts, the court saying: "It clearly appears from the facts found in the present case that the sacks containing the gold coin, as

well as the package in which the currency was sealed, were delivered to the cashier of the bank for the use of the intended donees. Each parcel of money contained, written upon it, what, in effect, amounted to the declaration of a trust in favor of the person who was indicated to be the owner of its contents. The money was carefully counted and placed in packages, thus separating it from all the other money and valuables of the donor. Upon each parcel or package appeared a written declaration made by, or at the request of, the donor, indicating as plainly as language could the intention of the latter in respect to the title and ownership of the property. The character of the property was such that no prudent person would have directed its removal from the vault of the bank. The donor had relinquished the key to his private drawer and tin box to the cashier of the bank, thereby effectually surrendering, so far as could be, all dominion over the property, and affording to the donee the means of obtaining possession of it. . . . Our conclusion is that the facts show a valid delivery to the cashier for the use of the donee, and that the delivery was made in view of impending death.”¹

160. DELIVERY TO THIRD PERSON FOR DONEE.—But a delivery need not be made to the donee in person; it may be made to a third person for him, even without the

¹ *Devol v. Dye*, 123 Ind. 321. See, also, *Thomas v. Lewis*, 15 S. E. Rep. 389. In Kentucky it was held that the delivery by the decedent of the key of her desk, and the actual delivery to her mother of the letter of A containing a full description of the notes and bonds held by him as agent of the decedent, was a sufficient delivery to make a gift *mortis causa* complete: *Stephenson v. King*, 81 Ky. 425. The key must be delivered as a delivery of the gift, and not as the means of acquiring the possession. Thus, if A delivers to B a key to his drawer in the house, and tells B to take out his watch and give it to C, and B fails to do so until A is dead, the gift is invalid: *Powell v. Hellicar*, 26 Beav. 261; S. C. 5 Jur. N. S. 232; 28 L. J. Ch. 355. In this case the donee was unaware of the gift until after A's death. Suppose he knew of it, and accepted the gift before A's death, *quare*?

knowledge of the latter. The delivery must be made to such third person for the use of the donee, and if it is made "under such circumstances as indicate that the donee relinquishes all right to the possession or control of the thing given, and intends to vest a present title in the donee, the gift will be sustained."¹ Such a person becomes a trustee of the donee, and the trust thus created may be enforced against him, even a *donatio mortis causa*.² Thus

¹ *Devol v. Dye*, 123 Ind. 321; *Farquharson v. Cave*, 2 Coll. 356; 15 L. J. Ch. N. S. 137; *Smith v. Ferguson*, 90 Ind. 229; *Wilcox v. Matteson*, 53 Wis. 23; *Gano v. Fisk*, 43 Ohio St. 462; *Walsh's Appeal*, 122 Pa. St. 177; *Michener v. Dale*, 23 Pa. St. 59; *Hunter v. Hunter*, 19 Barb. 631 (to wife for son).

² *Devol v. Dye*, *supra*; *Bouis v. Ellis*, 17 Beav. 121; *Grymes v. Hone*, 49 N. Y. 17; *Borneman v. Sidlinger*, 15 Me. 429; *Drury v. Smith*, 1 P. Wms. 404; *Milroy v. Lord*, 4 De Gex, F. & J. 264; *Martin v. Funk*, 75 N. Y. 134; *Beals v. Crowley*, 59 Cal. 665; *Hill v. Stevenson*, 63 Md. 364; 18 Am. Rep. 231; *Minor v. Rogers*, 40 Conn. 512; *Meriwether v. Morrison*, 78 Ky. 572; *Contant v. Schuyler*, 1 Paige, 316. If the donee demand it of the donor's executor, that is evidence of an acceptance: *Hunter v. Hunter*, 19 Barb. 631; *Dole v. Lincoln*, 31 Me. 422; *Gardner v. Merritt*, 32 Md. 78, 82; *Gass v. Simpson*, 4 Coldw. 288; *Caldwell v. Renfrew*, 33 Vt. 213; *Miller v. Le Piere*, 136 Mass. 20; *Sessions v. Moseley*, 4 Cush. 87; *Bostwick v. Mahaffy*, 48 Mich. 342; *Wyble v. McPheeters*, 52 Ind. 393; *Miller v. Billingsly*, 41 Ind. 489; *Stone v. Hackett*, 12 Gray, 227; *Farquharson v. Cave*, 2 Colly. 356, 386; *Walker v. Crews*, 73 Ala. 412; *Conner v. Root*, 11 Col. 183; *Rinker v. Rinker*, 20 Ind. 185; *Jones v. Deyer*, 16 Ala. 221; *Kilby v. Godwin*, 2 Del. Ch. 61; *Michener v. Dale*, 23 Pa. St. 59; *Gourley v. Linsensbigler*, 51 Pa. St. 345; *Trorlicht v. Weizenecker*, 1 Mo. App. 482; *Emery v. Clough*, 63 N. H. 552; *Huntington v. Gilmore*, 14 Barb. 243; *Barnes v. People*, 25 Ill. App. 136. A deed left at the registry office for registration was held to be a delivery: *Mason v. Holman*, 10 Lea. 315; *Davis v. Garrett*, 18 S. W. Rep. 113; *Dresser v. Dresser*, 46 Md. 48; *Newton v. Snyder*, 44 Ark. 42; *Dickeschied v. Exchange Bank*, 23 W. Va. 340; *Barclay's Estate*, 2 W. N. C. 447; S. C. 33 Leg. Int. 108. But see *Walsh v. Kennedy*, 2 W. N. C. 437. A wife, in her last sickness, requested her husband to give to her daughter her wearing apparel, watch, and ring, all then in her possession, for her use, which he promised to do, and after her death he made an inventory of them, locked the articles in a strong box, gave the key to his wife's friend, and sent the box to the daughter. It was held that there was a valid gift, the delivery to the wife's friend being a sufficient delivery of the articles, which at the wife's death belonged to the husband: *Lucas v. Lucas*, 1 Atk. 270. A dying person told her servant to take the keys of her dressing-case, and to deliver her watch and trinkets which it contained to the plaintiff. The servant took the keys, and kept

A delivered to B \$300 and took from him a writing wherein he agreed to pay A the sum he received with interest, "on demand, if she call for it before she deceased, if not to be paid to" C "by her order." A retained this paper, and it was with her other papers at her death. She never collected any part of the money. Her intention was in taking the paper to have it so drawn that C would have whatever she should not use of the \$300. This was regarded as a gift to C, vesting the title to the money in him, subject to be defeated only by A taking some further action in regard to it; and she never having taken any, the transaction was a gift *inter vivos*.¹ But where A, shortly before her death, "expressed her anxiety," as the report of the master in chancery ran, to a third person, in the absence of B, "that B should have her furniture," and said "that she gave all the furniture to B and desired" such person "to take care of it for B," but there was no delivery, actual or symbolical, of any part of the furniture, a finding of the master that there was no gift was affirmed.²

161. DELIVERY TO AGENT OF DONOR—But to render a delivery to a third person valid, such person must not receive it as the agent of the donor; he must receive it as the agent of the donee. If he receive it with the secret intent of keeping and claiming it as his own, he nevertheless is the agent of the donee, and may be held to an account. But a delivery by the donor to his own them until after the death of her mistress. It was held that the gift was void: *Powell v. Hellicar*, 26 Beav. 261; S. C. 5 Jur. N. S. 232; 28 L. J. Ch. 355. A father indorsed a note to his child, delivered it to the child's mother for it, and then collected the principal and interest. This was held to be a gift: *Second Nat. Bank v. Merrill, etc.*, Works, 50 N. W. Rep. 503.

¹ *Blanchard v. Sheldon*, 43 Vt. 512.

² *Blake v. Pegram*, 109 Mass. 541. If the person to whom it is delivered is not to deliver the gift to the donee until after the donor's death, the gift is void: *Augusta Sav. Bank v. Fogg*, 82 Me. 538.

agent, or to a person who receives it as the agent of the donor, is nothing more than a retention of the gift by the latter, and is no delivery whatever. So the delivery of property to a third person, accompanied by instructions to deliver it to the donee at the donor's death, the latter meanwhile retaining control over the property, is ineffectual; because such third person is merely the bailee or agent of the donor.¹

162. DONOR REVOKING MANDATE TO DELIVER TO DONEE.—Of course if the agent charged with the duty of making the delivery to the donee is the agent of the donor, the gift may be countermanded at any point of time before a delivery is made to the donee, or at any time before the agent ceases to be the agent of the donor and becomes the agent of the donee. In many cases it is difficult to determine when the power to revoke the agent's authority and to countermand the order have ceased. In Canada arose a very close case, which illustrates the question under discussion. A mother being ill, gave the key of a drawer in a bureau where a mortgage made by her son to her was kept, to another son, telling the latter that she desired that he give the mortgage to her son, the mortgagor, if she should not see him again. The donee was afterward sent for, came to the house, and saw his mother alone. She said to him that "your mortgage is there in that drawer, when you go home you can take it with you." He went away without taking it. After her death the son having

¹ *Devol v. Dye*, 123 Ind. 321; *Tomlinson v. Ellison*, 104 Mo. 105; *Duncan v. Duncan*, 5 Litt. 12; *Peck v. Rees*, 27 Pac. Rep. 581; *Stephenson v. King*, 81 Ky. 425. "A mere delivery to an agent in the character of an agent for the giver, would amount to nothing; it must be a delivery to the legatee, or some one for the legatee:" *Farquharson v. Cave*, 2 Colly. 356, 367; *Newton v. Snyder*, 44 Ark. 42. See the extreme case of *Diefendorf v. Diefendorf*, 132 N. Y. 100, where the gift was held valid.

the key gave the mortgage to him. It was held that the mandate to the son having the key was revoked when the mother saw the donee, and as there was no delivery after that by her, there was no gift.¹ If the gift is delivered to a third person for the donee, with authority to deliver it to the latter, then until the authority is executed, and the article delivered to the donee and accepted by him, such depositary is the agent of the donor, and the latter may revoke the gift and reclaim the property.² Thus where the owner of choses in action deposited them with A, to be equally divided between his wife and children; and the depositor later authorized A, in case of his death, to dispose of enough choses to secure himself against loss as depositor's indorser, the gift to the wife and children was held invalid.³ And it may be stated generally that if the donee is an adult person, the donor may reclaim the property given, and placed in the hands of a third person for the donee, at any time before the donee has accepted the gift; for acceptance is essential to the validity of all gifts. Thus an order by the donor to his agent to collect certain rents and pay them to A as a gift may be revoked at any time before A is informed of the gift.⁴

163. DELIVERY BY EXECUTOR OR ADMINISTRATOR.—If the gift has not been perfected by the donor in his lifetime, so as to effectually debar his right and power to re-

¹ *Travis v. Travis*, 8 Ontario, 516; affirmed 12 Ont. App. 438. See *Sterling v. Wilkinson*, 83 Va. 791.

² *Dickeschied v. Exchange Bank*, 28 W. Va. 340. This statement is fully supported by the case cited, but is diametrically opposed to *Standing v. Bowring*, 31 L. R. Ch. Div. 282. And see also *Wells v. Collins*, 74 Wis. 341.

³ *Sterling v. Wilkinson*, 83 Va. 791.

⁴ *Wells v. Collins*, 74 Wis. 341. But as the law presumes an acceptance, if the gift is beneficial, where the donee is a minor, as soon as the delivery is made to a third person for the donee, the gift is complete and irrevocable. See, also, *Standing v. Bowring*, *supra*.

claim it, then neither his executor nor administrator, unless so directed by his will, can deliver the gift to the donee and bind the heirs of or creditors of the donor.¹

164. DONOR REPOSSESSING HIMSELF OF THE GIFT AFTER DELIVERY TO AGENT.—If the depositary is the agent of the donor, the latter may recall the gift at any time; and if the agent, after his power is revoked, deliver the gift, the transaction will be a nullity, and the donor may reclaim the gift from the donee, and so may the donor's executor or administrator.²

165. REVOCATION OF AGENT'S AUTHORITY AFTER DELIVERY MADE.—If the depositary is nothing more than the agent of the donor, yet if he delivers the gift to the donee before his authority is recalled by the donor, the gift will be valid, and thereafter it cannot be revoked.³

166. DELIVERY TO THIRD PERSON FOR FUTURE DELIVERY TO DONEE.—In discussing the sufficiency of a delivery of a *donatio mortis causa*, it was said in an early Maine case that "there must be an actual delivery to perfect the gift, but it may be made to a third person, for the use of the donee, if such third person retain possession up to the time of the death of the donor."⁴ It is quite evident that the court had no reference to a delivery by the donor to such third person to be delivered to the donee if the donor should die. This point was not involved. In a New York case language somewhat similar is used.⁵ This language

¹ Picot v. Sanderson, 1 Dev. L. 309.

² Picot v. Sanderson, 1 Dev. L. 309; Barnes v. People, 25 Ill. App. 136; Dickeschied v. Exchange Bank, 28 W. Va. 340.

³ Picot v. Sanderson, 1 Dev. L. 309.

⁴ Borneman v. Sedlinger, 15 Me. 429, citing Drury v. Smith, 1 P. Wms. 404.

⁵ "And there must be a continuing possession:" Huntington v. Gilmore, 14 Barb. 243.

applies, however, to instances where the donor did not intend that a delivery be made until after his death; but where the delivery in a *donatio inter vivos* is to a third person, for the donee, in the character of an agent for the giver, to make the delivery only after the giver's death, the gift is invalid.¹ So, if the delivery is to an agent, with directions to deliver the gift to the donee after the death of the donor, and if he should recover then to return the property, the delivery is insufficient.²

167. DELIVERY TO THIRD PERSON, BUT NO ACTUAL DELIVERY TO DONEE UNTIL AFTER DONOR'S DEATH.—In discussing what is the effect of a depositary's failure to deliver the gift to the donee until after the donor's death, the Supreme Court of Massachusetts said: "If it be delivered to a third person, with authority to deliver it to the donee, this depositary, until the authority is executed by an actual delivery to and acceptance by the donee, is the agent of the donor, who may revoke the authority and take back the gift; and, therefore, if the delivery do not take place in the donee's lifetime, the authority is revoked by his death; the property does not pass, but remains in the donor, and goes to his executor or administrator. But if intended as a gift *causa mortis*, it would not become absolute and irrevocable till the death of the donor; and, therefore, if delivered to and accepted by the donee, after the decease of the donor, it is sufficient."³ This language

¹ *Newton v. Snyder*, 44 Ark. 42.

² *Walter v. Ford*, 74 Mo. 195. In *Vogel v. Gast*, 20 Mo. App. 104, it is a query whether a direction from the donor to the bailee to deliver the property to the donee perfects the gift if the order be not executed by the bailee: supporting the general rule, *Dickeschied v. Exchange Bank*, 28 W. Va. 340. Thus, a donor wrote on two bonds, given him by his son, that they were a free gift to the latter, and gave them to his daughter, but without any direction as to their disposal, and they so remained until after his death. It was held that this was not a good gift: *Robson v. Jones*, 3 Del. Ch. 51.

³ *Sessions v. Mosely*, 4 Cush. 87.

receives an illustration from an Illinois case. There a donor was sick and expected to die in a few days. She called the donee's daughter to her side and said, naming her, "Take this package and take care of it, and if I die before your father comes back give it to him." The donee returned before the death of the donor. Before his return the donor told his daughter that she could put the gift in a small paper box in the trunk from which it was taken, and it was there put; but the next day the daughter, by direction of her mother, and without the knowledge of the donor, took the gift out of the donor's trunk and put it in her mother's trunk, where it remained until the donor's death. It was held that when the father returned, before the donor's death, the daughter had no authority to deliver the package to him; and that the language used also showed that the donor intended to retain the control and possession of the gift if the donee returned during her lifetime so that she herself might make the gift to him.¹ But the doctrine of these cases has not met with universal approval or adherence. Thus in Michigan, where a father put property in the hands of a third person to be delivered to his daughter upon his death, it was held to be a sufficient delivery to create a trust in favor of the daughter.² So where a father delivered bonds to a trustee for his children, to be delivered after his death, the gift was held good, although the trustee had delivered the bonds to the donor's administrator, because he considered the gift void.³

¹ *Barnes v. People*, 25 Ill. App. 136. In *Sessions v. Mosely*, *supra*, it is admitted that a delivery to a third person of a *donatio mortis causa* is valid, although the depositary do not deliver it to the donee until after the donor's death.

² *Bostwick v. Mahaffy*, 48 Mich. 342. Where the depositary retained the money until the donor's death, without the knowledge, and against his intent, of the donor, the gift was deemed good, and the donee allowed to recover the amount from such depositary: *Miller v. Billingsly*, 41 Ind. 489.

³ *Wyble v. McPheters*, 52 Ind. 393.

So where the donor gave to a trustee certain shares of railroad stock, reserving to himself the income from them during his life, and then they were to be delivered to the donees, the gift was upheld as a valid trust.¹ A few other cases will illustrate the point we are discussing. A gave B a note payable to herself and signed by C, directing him to take it and do the best he could with it, and furnish her with what means she needed to live on, and, after her death, pay her debts and erect a certain kind and sized monument over her grave, and what remained give to D. This gift was construed as invalid for lack of delivery.² It is clear that this case is rightly decided; for the donor, by her agent, retained the absolute use and dominion over the thing given. This was an instance where the property was to become the donee's only in the event of the death of the donor before it was consumed, or before more than enough was left to pay her debts and buy her a monument. It is quite clear that a gift *inter vivos* to take effect only in the event of the donor's death is void.³

168. PRESUMPTION ARISING FROM PROOF OF DELIVERY TO A THIRD PERSON.—If the property is delivered to a third person, accompanied by the use of language or acts which clearly show that the owner intended it as a gift for the donee, the presumption is raised, in the absence of coun-

¹ *Stone v. Hackett*, 12 Gray, 227. See *Kekewick v. Manning*, 1 DeG., M. & G. 176; *Gardner v. Merritt*, 32 Md. 78; *Minor v. Rogers*, 40 Conn. 512; *Meriwether v. Morrison*, 78 Ky. 572.

² *Smith v. Ferguson*, 90 Ind. 229. There was nothing to show that the gift was made in the donor's last sickness, and so, for that reason, it failed as a gift *mortis causa*.

³ *Allen v. Polereczky*, 31 Me. 338; *Dole v. Lincoln*, 31 Me. 422. In *Southerland v. Southerland*, 5 Bush. 591, the donor told his depositary to deliver the note given to the donee, but there was no delivery until after the donor's death. The gift was held good: *Waring v. Edmonds*, 11 Md. 424.

teracting circumstances, from a proof of these facts, that the person thus receiving it took it as the trustee of the donee, and not merely as the agent of the donor.¹

169. BETWEEN MEMBERS OF THE SAME FAMILY—HUSBAND AND WIFE.—The relation of husband to wife is so close and their every-day life is so blended that it is often difficult to tell when the husband has perfected a gift to his wife by delivery ; and this is not only true of a parent and child, but also of any one who is a member of his family. The law takes cognizance of these relationships, of the daily contract of such a donor and donee, of the blending, as it were, of their daily walks and acts, and will construe an act to amount to a delivery where it often would not if the donor and donee were not members of the same family. The law does not dispense with an actual or constructive delivery, but it accepts the acts of the donor, if a clear intent to give is shown, as amounting to a delivery, when it would not do so if the donor and donee occupied separate habitations and were not members of the same family. “The question of change of possession must be considered in connection with the other facts in the case,” said Chief Justice Cooley. “It is no doubt true that in respect to the property in general there was no open and visible change of possession. But how could there have been ? The donor and donee were living together as husband and wife, at a public hotel. Must she separate from him in order to be competent to receive from him a gift ? If he gives her a picture or an article of furniture, must she procure it to be kept by some one else instead of placing it in her own apartment ?” In the case from which this quotation is made,

¹ *Devol v. Dye*, 123 Ind. 321 ; *Shackleford v. Brown*, 89 Mo. 546 ; *Michener v. Dale*, 23 Pa. St. 59 ; *Sessions v. Mosely*, 4 Cush. 87.

the husband and wife were living at a public hotel together. The husband purchased a horse, a buggy, a sleigh, and a quantity of household furniture. He, sometime after the alleged gift to the wife, mortgaged all this property without the knowledge of his wife. In her testimony with respect to a part of the property which the mortgagee seized, she said: "He gave me the horse in the fall of 1871. My husband also gave me some robes, harness, and a cutter. Wolf robe and lap-robe was given to me in the summer of 1872. The robe was given to me in the winter of 1873. He said, 'I bought these things for you.' When he brought up the buggy he brought it to the door and asked me to go for a drive. He said he had bought that buggy for me, and 'now give it to you, with the horse, for your own use, to do as you please with it.' After he gave it to me I used the horse and everything about it." The wife also testified that after the horse was thus given her she went to the stable where it was kept and gave directions respecting its keeping, and afterward controlled it. The court considered that there was sufficient evidence for the jury to draw the conclusion that there was a delivery, and seem to regard the acts proved sufficient proof of that requisite to the validity of the gift.¹ So, when a man and woman were married, he went to his father's farm and got a cow and calf he owned. He drove them up to his own house, and, calling her out, said: "Here, Marilla, I give you this cow and calf for your own; take care of them." He then turned them over to his wife, and she milked the cow, and fed and cared for both of them, until just before her sickness, when her mother-in-law came and told her she ought not to be milking the cow and feeding them.

¹ *Davis v. Zimmerman*, 40 Mich. 24; *Armitage v. Mace*, 96 N. Y. 538 (gift of horse); S. C. 16 J. & S. 107.

She said she would take them home, milk the cow, and let her have the milk, and care for them until the daughter-in-law got well enough to look after them. It was held that this showed a valid delivery. "He drove her up," said the court, "and presented her by words, and turned her over to the plaintiff [the wife], who afterward fed and milked her. This was as much an act of delivery as the situation of the parties and the property would admit of. The fact that the property in controversy remained on the place where the husband and wife lived ought not to destroy the gift. The matter of change of possession is often necessarily a relative question. Regard must be had to the relation of the donor and the donee, and the situation of the property. It would be unreasonable, as it might be utterly impracticable, for the wife, receiving such gifts from the husband, to take it away and keep it at another place than the common home.¹ A husband was about to go on a journey to a foreign

¹ *Schooler v. Schooler*, 18 Mo. App. 69. In England the rule is that there must be some decided act evidencing a delivery. Thus, a husband, by three letters written and signed by himself, directed to his wife, gave her all the furniture, linen, and plate he owned. The furniture and other articles were at his death in the house which had been occupied by him and his wife, and the whole had been used by them in the ordinary way. It was held that there was no gift, for want of a sufficient delivery, and that the husband had not made himself a trustee for her. "I am very sorry for it," said the Vice-Chancellor, "because it is a monstrous state of the law which prevents effect being given to such a gift." And so do we think, and that the decision was erroneous. Must she have packed up the furniture and taken it away in order to have rendered the gift perfect? Certainly not: *Breton v. Woollven*, L. R. 17 Ch. Div. 416; S. C. 50 L. J. Ch. Div. 369; 44 L. T. N. S. 337; 29 W. R. 777. See *Tyrrell v. York*, 57 Hun, 292. A husband may give his wife a policy of insurance, and the delivery may be proved by the declaration of the donor the same as the gift itself may be: *Estate of Malone*, 36 Leg. Int. 63; Appeal of *Madeira*, 17 W. N. C. 202. Gift of sleigh and billiard table by husband to wife held invalid: *McAfee v. Busby*, 69 Ia. 328. Gift of piano held invalid: *Kirkpatrick v. Finney*, 30 La. Ann. 223; *Schaffer v. Dumble*, 5 Ontario, 716; *Kane v. Desmond*, 63 Cal. 464 (held valid); *Kellogg v. Adams*, 51 Wis. 138 (invalid); *Wambold v. Vick*, 50 Wis. 456 (valid).

country, and, calling his wife's attention to some government bonds he owned, said: "I give these bonds to you, and I show you how to cut the coupons so you may know how to do it yourself, and use the money for your living." He did not deliver them to her, but took them to a bank, in the vault of which he had a drawer in which he kept his private papers. He placed them in the drawer, which he locked and the key to which he retained. During his absence abroad, his father had access to the drawer, and, as the interest on the bonds matured, he detached the coupons and delivered them to the bank for collection, and as the money was collected it was paid to the wife. When the husband returned, he assumed control of the drawer, collected the interest in the same way his father had, and when the bank received the money it was passed to his credit. For two years the business was conducted in this way, after which the bank, by the husband's direction, opened an account in the name of the wife, in which it credited the interest as it was collected. He, however, continued to draw out money as he needed it, on checks drawn on the bank by himself in her name. She never had the bonds in her possession, and never saw them after they were first locked in the drawer. It was held that there was no delivery.¹ A wife's legacy was paid by the executor by means of a check for £995, drawn to the order of herself and husband. They both indorsed the check, and together went to the husband's bankers, when she gave the check to the manager, and in

¹ *Peters v. Fort Madison, etc., Co.*, 72 Ia. 405. See *Dow v. Gould, etc., Co.*, 31 Cal. 629. In 1869 the Supreme Court of New York decided that a wife could not take a gift from her husband: *Little v. Willetts*, 37 How Pr. 481. In Maine it is held that if the wife have possession at the time of the gift, no title will pass, and that there must be an actual and formal delivery: *Lane v. Lane*, 76 Me. 521. Where the words used in making the alleged gift are ambiguous, the act of delivery must be more specific: *Fearing v. Jones*, 149 Mass. 12.

the presence and with her husband's assent, told the manager to open an account in her sole name, and place to the credit of it £800, and to credit the residue to her husband's current account, which was done. Afterward she drew checks on the account in her sole name, and he never interfered with the account. She gave checks to her husband in his favor, to be employed by him in his business. By her directions part of the money was invested in bonds, she holding a memorandum which stated that the bonds were held for her by the bank. Once the husband requested her to sign a memorandum charging her account and securities with the payment of the overdrawn balance of his account with the bankers, but she refused to do so. It was held that there was a gift of the £800 by the husband to the wife.¹

170. HUSBAND PURCHASING GIFT FOR WIFE.—If a husband purchase a gift for his wife, even though the gift consist of household furniture which is used in his own house, she living with him as husband and wife usually live together, there is a sufficient delivery; and that too even though the vendor supposed he was selling the subject of the gift to the husband.² If the vendor knew that the property was for a gift to the wife, the case is

¹ *Parker v. Lechmere*, 12 Ch. Div. 256; S. C. 28 W. R. 48.

In proving a gift of personal ornaments, very slight evidence of a delivery is necessary: *Tyrrell v. York*, 57 Hun, 292. In gifts by the head of a family and to a member of it, the presumption is that possession continued in the donor as the head of the family: *Kellogg v. Adams*, 51 Wis. 138. In the case of a sale between members of the same family, the presumption in Louisiana, is that possession was given to the vendee: *Dupuy v. Dupont*, 11 La. Ann. 226. A husband handed his wife a certain sum of money as a gift, and she immediately replaced it in his desk. This was held to be a good gift: *Corle v. Monkhouse*, 25 Atl. Rep. 157. A mother told her husband to give her son \$500 out of a certain sum of money due her in his possession; the son said he did not need it then, and took the father's note. This was held to be a valid gift against her estate: *Reynolds v. Reynolds*, 18 S. W. Rep. 517.

² *Schooler v. Schooler*, 18 Mo. App. 69.

stronger still than if he did not know it. Thus a husband purchased a horse, and gave the vendor his note in payment. Before he executed the note, on the same day, he told the vendor that the horse was for his wife, and asked him to send it to a distant city, which was done. On arrival the husband directed his servant to take the horse to another place and put it in a stable where he kept his own horses. The husband paid all the expense of transportation. Twice before the donor's death the horse was used—once by the husband when taking his wife to see a relative, and once to carry a messenger for a physician for him. The wife while the horse was being transported from the place of sale to the stable of the husband, was informed by him that the horse was a gift to her. On these facts the court held that there was a good delivery. “We think,” said the court, “when the facts to which we have already adverted as evidential of the husband's intention are carefully considered, the transaction will appear as an original purchase by the husband for the wife, with the knowledge on the part of the vendor before the bargain was in any way consummated, or executed by either party, that the horse was bought for the wife, and that the title was to pass directly to her as far as the intent of the parties could make it hers, so that, as between husband and wife, the consummation of the gift is found in the execution of the note on the part of the husband which purchased for her the horse; and when the horse was delivered in Brooklyn [the place where the vendor agreed to deliver it], it was delivered as hers, and then became hers subject only to such right as the law would give the husband as trustee for the wife.”¹

¹ *Wheeler v. Wheeler*, 43 Conn. 503. A husband gave a chattel mortgage on his household goods. After sale at his dwelling-house, under the mortgage, the pur-

171. HORSE RETAINED BY HUSBAND IN HIS OWN STABLE—HORSE IN LIVERY STABLE.—If a husband attempt to give his wife any of his horses then owned by him and kept in a stable not his own, or in a public livery stable, with his other horses, mere words of gift will not consummate the gift. In such an instance the *indicia* of ownership in the husband continues the same after the pretended gift as before; and something more is necessary to complete it.¹

172. REMARKS ON SUFFICIENCY OF DELIVERY BY HUSBAND TO WIFE.—In judging of the sufficiency of the delivery of the subject-matter of the gift to the wife by the husband, their relationship in the actual transactions of the affairs of life, and the thing given must always be considered. In the case of a horse or cow, nothing can be more natural than that there need be no visible transfer of the possession to pass the title. It cannot be expected that there will be a manual transfer of the animal. The common practice of the husband caring for and controlling such property of the wife is a very potent factor. Who can better take care of the property than the husband? Must she feed and care for it or take it to her separate farm or stable, if she have any? Must the husband bring the horse to his wife, deliver to her the rein, and say, "This is your horse?" or must the horse be in their actual presence when the words of gift are pronounced? We do not believe these things are requisite to a valid gift of such animals; but if the husband use formal words of gift, and

chaser said to the mortgagor's wife, "I give you these and all the property I have purchased to-day." The property remained in the house used by the husband and wife. It was held that there was a good gift: *Allen v. Cowan*, 23 N. Y. 502. A purchase of debentures, the wife drawing interest, purchased for her, upheld as a gift: *Bland v. Macculloch*, 9 W. R. 65.

¹ *Wheeler v. Wheeler*, 43 Conn. 503, 509.

then, either by her express request or by an implied request, cares for the animal even at his own expense, and thereafter regards it as her property, the gift is valid, especially so if the animal is on the home farm or premises, and even so if at a distance on the donor's premises or under his control. But these statements are inapplicable to a gift of ornaments for her person, or of such articles as are habitually retained by a wife in her separate possession, although their place of deposit is only in a drawer of a bureau or dressing-case of which all the other drawers are filled with the husband's exclusive property. In such an instance there must be some manual control by the wife of the article given. The habits and practices of families, of every common-day life, is a potent factor in determining the question of delivery. For instance, will it be claimed that a wife's wearing apparel is not in her exclusive possession, although they may hang in the same closet, or on the same peg, with her husband's? If a husband gives his wife a dress, we think she must come into the actual and physical possession of it to perfect the gift, a possession that is radically different from that of a horse or cow given her by him. Many other illustrations can be cited, but these are sufficient. So there is no doubt that the condition of the family may be considered in determining what is a sufficient act of delivery. A family living in one or two rooms must necessarily have their property of the character which is kept in the house much in common and in mutual possession; while one of wealth, having a large and commodious house or mansion, will keep their individual property less commingled than their poor neighbors in straitened circumstances. What would be a delivery in the one might warrant the jury or court in finding was not in the other. The relative situation of all the parties must

be considered along with the subject-matter of the gift, and the customs and practices of families in the walks of life occupied by the donors and donees. "It is not to be expected," said the Supreme Court of Alabama, "that a wife would accept a gift of a carriage and horses, as she would a watch or a jewel, from her husband. If he brings such a gift to the house where she is tarrying, with the declared intention of bestowing it upon her, causes her name to be graven on the carriage, calls her out to try it, tells her it has been bought for her, and that it is hers and not his, and leaves it in her possession and under her control, and she remains in possession of it, claiming it and controlling it as her own, as a gift from her husband, until his death—that is a sufficient delivery to perfect the gift. In such cases *by delivery* is not meant an actual manual delivery, but any circumstances amounting to a clear demonstration of the intention of the donor to transfer and the donee to accept the thing given, and which puts it into the power of the donee or gives such authority to take possession of the thing given, is all that is necessary to perfect the gift."¹

173. MONEY DEPOSITED IN JOINT NAMES OF HUSBAND AND WIFE.—So strict has the rule requiring a delivery been drawn that an agreement between a husband and wife, that moneys deposited in a savings bank, in their joint names, and belonging to them jointly, shall become

¹ *Goree v. Walthall*, 44 Ala. 161. Where slaves were given by parol to a married woman, who thenceforth, during her husband's lifetime, uniformly asserted title and possession in herself, to her sole and separate use, to which assertions her husband uniformly assented, it was held that she and not the husband had possession, and that he had not reduced them to his possession: *Gillespie v. Burleson*, 28 Ala. 551; *Smith v. Hardy*, 36 Wis. 417; *Miller v. Miller*, 3 P. Wms. 356. Delivery of horse: *Armitage v. Mace*, 96 N. Y. 538; *S. C.* 16 J. & S. 107. Property given to wife and kept on her own farm: *Smith v. Hardy*, 36 Wis. 417. See *Brown v. Niethammer*, 141 Pa. St. 114.

at the death of either wholly the property of the other, it has been held is not a valid gift.¹

174. DELIVERY BY PARENT TO CHILD—INFANT.—Where the gift is by a parent to his child who is a member of his family—residing with the parent—especially if he is an infant, what would be deemed an insufficient delivery under other circumstances will be accepted as sufficient. In an unreported South Carolina case² it was said: “There is a distinction to be made between cases where the donor and donee live apart, and those where they necessarily live together. In the former it has been held, ever since Twyne’s case, that where the possession continued in the donor *unexplained*, the gift would be deemed fraudulent. But in the case of a father and a child, who from their connection must live together, at least until the child becomes of age, it would have the effect of destroying all gifts, to say that the possession must be considered that of the father.” In another case in the same State it was said: “In this case possession and payment of taxes cannot be considered badges of fraud, for the donees were infants of tender years, and therefore incapable of taking charge of the property.”³ “The donee,” said the Supreme Court of Alabama, “on account of his infancy, was not entitled to *actual* possession of the slaves, and *could do* no act to prejudice his rights, and inasmuch as he could not act in respect to the property, it seems necessarily to follow that he cannot be injured by an omission to act.”⁴ In the case just cited the

¹ Drew v. Hagerty, 81 Me. 231.

² Executors of Curry v. Ellerbe (1820), quoted in Howard v. Williams, 1 Bailey, L. 575. See Reid v. Colcock, 1 N. & McC. 592.

³ Jacks v. Tunno, 3 Deasus. 1.

⁴ Sewall v. Glidden, 1 Ala. 52.

donee was under twenty-one years of age, and resided with his father who gave him a slave. The slave never was under the actual management or control of the son, but remained under the control and management of the father, the donor, until the latter died, which event took place before the son was of age. The father received the hire of the slave for his own use, sending him to a distant city to be hired out, and his agent sent his hire to the father. The son resided with his father until his death. It was held that there was a valid gift of the slave.¹ A father called up his son and a slave, and in the presence of witnesses declared that he gave the negro to the son. The son was a minor living with his father. The father kept the negro on the farm, directed and ordered him in his work just as he did the slaves he owned, and he there remained until after the son arrived at age, when the latter went to the Texas war. The slave was levied upon as the property of the father after the son became of age. The transaction was held to be a valid gift.² A husband handed his wife a note, saying to her that it was for her and their seven-year-old child. She took and kept it, though he sometimes drew and used the interest. This was held to be a valid gift to both of them.³ A father procured a brand to be recorded, according to the statute, in the name of his minor child, and branded certain cattle with this brand, with the avowed object of making a gift of the cattle to the child. It was held that there

¹ *Sewall v. Glidden*, 1 Ala. 52. See Section 176. The relationship of the donor and donee must be shown, and the circumstances under which they are living: *Hillebrant v. Brewer*, 6 Tex. 45; *Sims v. Sims*, 8 Port. (Ala.) 449. Gift by father to his daughter of a piano, which was kept in the father's home, valid: *Pierson v. Heisey*, 19 Ia. 114. See Section 137.

² *Rector v. Danley*, 14 Ark. 304; *S. C. 5 Eng.* 211; *Dodd v. McCraw*, 3 Eng. 83; *Lowther v. Lowther*, 30 W. Va. 103.

³ *Mack v. Mack*, 5 T. & C. (N. Y.) 528.

was a valid gift, although he retained and cared for the cattle on his farm.¹ A father at different times signified his intention to give certain negroes to his daughter. One time when she had one of the negroes, a child, in her arms, her mother observed to certain persons present that she ought to have the negroes, speaking of those in question, and went on to observe that her husband had given them to the daughter. The father was present and answered that that had been already done. This was held to be a sufficient gift.²

175. POSSESSION OF DONOR—PARENTS IN POSSESSION OF DONEE—INFANT—GUARDIAN.—The possession of the parent, the natural guardian of his infant child, who makes a present to such child and retains the possession of the article given, is the possession of the donee, or at least such possession is not inconsistent with such donee's title. In such an instance there is no presumption of fraud. As the parent is entitled to the possession of his minor child's property, the law does not require him to make a formal delivery to the child, when he must at once repossess himself of the property given.³

¹*Hillebrant v. Brewer*, 6 Tex. 45. This case turned upon the fact of the cattle having been branded with the child's brand; for that was construed as a symbolical delivery. Declarations of the donor that he made the gift is admissible: *Carter v. Buchannon*, 3 Geo. 513. "We think that there was no error in charging that the simple fact of the donor's retaining possession of the thing given, is sufficiently explained by showing that the donee lives with him and is a minor, being his child, or standing in the place of his child. This we think is good law:" *Ector v. Welsh*, 29 Geo. 443. Colt on farm: *Porter v. Gardner*, 60 Hun, 571.

²*Davis v. Davis*, 1 Brev. 371. If apparel is put on a boy by his father, it is a valid gift to the boy: *Hayne's Case*, 12 Coke, 113; so a watch: *Smith v. Smith*, 7 C. & P. 401.

³*Howard v. Williams*, 1 Bailey, L. 575; *Davis v. Garrett*, 18 S. W. Rep. 113; *Smith v. Littlejohn*, 2 McC. 362; *Kid v. Mitchell*, 1 Nott. & McC. 334. The case of *Madden v. Day*, 1 Bailey, L. 337, has a dictum that there must be an absolute delivery; but in the case of *Howard v. Williams*, *supra*, this dictum is denied.

176. INSTANCES OF IMPERFECT DELIVERY BY FATHER TO CHILD.—A father owning a woman slave, sold her and then rescinded the sale. He then called the woman into the yard, and his daughter Mary, a little girl six years old, to the door of his house, and in the presence of several persons, his daughter and the slave, calling on those present to take notice, declared that the woman, naming her, was the negro of his daughter; and further said: "In the presence of you all, I give this negro to my daughter Mary." Previous to that time he frequently declared that he intended to give the woman to his daughter; and afterward, referring to what had taken place at his house in the presence of witnesses, declared that he had thus given her. It was held that the evi-

And see *Smith v. Henry*, 2 Bailey, L. 118, 122; *Rector v. Daniel*, 14 Ark. 304. The possession of a father of a slave given by him to his infant child is the same as if a stranger had made the gift and the father took possession of the slave: *Dodd v. McCraw*, 3 Eng. (Ark.) 83. In this case it was said: "Where there are many persons living together, constituting one family, and there are slaves in the service of the family, subject to the occasional order of each, the possession in law is considered and regarded as in those of the family who have right to the property; and if in such case an infant be the real owner and have right to the slaves, the infant will be regarded as in the possession, although the father controls and causes them to work as he pleases; and where many persons are in the enjoyment of property, be these adults or infants, in part, those who trust upon the faith of the property are bound to discriminate and ascertain at their peril who has title among those using it. Where the gift is made to an infant and the father takes possession, he holds as natural guardian, and the possession is the infant's; and such a case is not within the statute of frauds, so as to subject the property to the creditors of the father. This doctrine is well settled by the authorities. If the possession of the father, of property given to his child by a stranger, is the possession of the child, it is equally so where the gift is directly made by the father himself. There can be no difference in principle." During his last illness, a father expressed a desire to his daughter to give her his horses and carriage, but did not request her to take possession of them nor direct the stable-keeper to deliver them to her; nor was it shown that there was any actual transfer or change of possession, though she used them afterward and the coachman obeyed her orders. It was held that there was no gift: *Delmotte v. Taylor*, 1 Redf. 417. The decision in *Cranz v. Kroger*, 22 Ill. 74, that a father may revoke a gift made by him to his minor son, is not the law: *Kellogg v. Adams*, 51 Wis. 138; *Kerrigan v. Rautiga*, 43 Conn. 17.

dence of a gift was incomplete, and that to perfect the daughter's title, the father should have parted with the dominion of the slave in her favor.¹ A father standing on the piazza of his house, in the presence of his wife and daughter, pointed to a colt, at the time standing with its mother near by, and said to the daughter: "I give it to you." After that the colt was known as the daughter's property and so regarded by the family and the neighbors. The daughter was only twelve years of age. When the father died the colt was one or two years old, and had never been out of his actual possession. She lived with her father until his death, and afterward with her mother and her second husband. It was held that there never was a valid delivery.² A son under age, living with and working for his father on his farm, was told by the latter that "he might have the colt, if he would raise it." After that the son claimed the colt, but it remained with the father's horses, and was fed with them. The father, with the consent of the son, traded the colt for a mule, which was put upon the farm, the son still claiming and using it when he saw fit, and it was also used by the father on the farm. The father left home some time afterward, on account of domestic trouble, and took the mule with him and kept it two or three years until his death. The son never took the mule from the farm, though he himself left. Several times the father said the mule was the son's, and when any one wanted to hire it, the father referred him to the son, saying: "If he will let you have it, all

¹ *Sims v. Sims*, 2 Ala. 117; S. C. 8 Port. 449. "No act was done," said the court, "which can be regarded as a delivery, or which seems to have been intended as such."

While the court holds that it does not reach the case of *Sewall v. Glidden*, 1 Ala. 52, referred to in Section 174, we think it was mistaken. See *Ivey v. Owens*, 28 Ala. 641.

² *Brewer v. Harvy*, 72 N. C. 176.

right." On such occasions the son received the hire. The son never demanded the mule of his father. It was held that there was no delivery.¹ A father gave his ten-year-old son, living with him, a colt one year of age. The father continued to feed and use the horse as his own until his death, which took place soon after; and after his death it remained with his widow, who believed it was hers. Once the father refused to sell the horse, assigning as a reason that he had given it to his son. It was held that this did not show a valid gift, for the reason that there was no delivery.²

177. PURCHASE OF GIFT BY PARENT FOR HIS CHILD.—Where a parent purchases a gift for his child, the question of delivery is often greatly simplified, just as where a husband purchases a gift for his wife.³ In Alabama a case arose somewhat similar to a purchase by a father for his child. A father was in debt, and his creditor had an execution against him; so they two agreed that the slave should be sold on the execution, be bid in by the executor's plaintiff, be redeemed by the father, and on redemption should become the property of his, the execution defendant's, son. This was done and the slave delivered to the donee. The gift was held valid. The court considered that, as soon as the purchase was made and the possession changed according to the agreement, the change of title or interest as between the father and son was consummated.⁴

178. PURCHASE BY THE CHILD WITH THE THING GIVEN—RIGHT OF CHILD TO THE ARTICLE PURCHASED—SALE OF GIFT.—A purchase by the donee of an article

¹ *Medlock v. Powell*, 96 N. C. 499.

² *McFarlane v. Flinn*, 8 Nov. Sco. D. 141.

³ See Sections 170, 245.

⁴ *Smith v. Wiggins*, 3 Stew. (Ala.) 221.

with the subject-matter of the gift, for instance, by trading, with the donor's acquiescence, will operate to render the original transaction a valid gift, when, if the donee retained the original subject-matter of the gift, it might be doubtful if the delivery was sufficient. Thus, where a daughter (an adult, it would seem), residing with her father, and who continued to reside with him as long as he lived, was given a colt, of which she had possession only at their residence, and which eight or nine years afterward she exchanged for a mare, which she kept on his farm as long as he lived, it was held that the mare was her property. During his life the father used the mare, but always regarded it as his daughter's. "This right of the father," said the court, "to reclaim his gift to his child while living with him must be confined to the gift itself, and cannot be followed in any other article of property in the purchase of which the proceeds of said gift may have been invested."¹ So, if the donor permits the donee to sell the gift and purchases of him with the proceeds other property, the gift is valid.²

179. GIFT BY FATHER TO CHILD OF LOTTERY TICKET. —An often cited case on the question of delivery, when the donor and donee bear the relation of parent and child, is that of a gift of a lottery ticket. In that case a father bought six lottery tickets. It does not appear that he bought the tickets for the child. He took the tickets home, and said they were for himself and wife and his four children, and he wrote the names of each on the tickets and put them in his desk. At this time the children were not present. A daughter, eight years of age, drew a prize; and when her brother said she ought

¹ *Lowther v. Lowther*, 30 W. Va. 103.

² *Carpenter v. Davis*, 71 Ill. 395.

to share its proceeds with the others, the father said, "No, she should not divide it; the ticket was her own, and the prize money [\$5,000] belongs to her, and she shall have the whole of it, and I will put it in trade for her." The father made other and similar declarations, all to the effect that the money drawn was his daughter's. The jury having found that there was a valid gift, their verdict was upheld.¹

180. GIFT BY PARENT TO ADULT CHILD—PERSON A MEMBER OF HIS FAMILY—Where the donee is a member of the donor's family, whether he is the donor's child or one not related to him, the rule with respect to delivery is very much relaxed; and the acts which would be considered as not constituting a sufficient delivery as between persons not members of the same family will be considered as sufficient in such instances. Thus where a father gave his adult daughter, living in the family, a calf whose dam had died, if she would bring it up, and she brought it up by hand, and it was fed on his farm; and after it became a cow the milk was used in his family, and no charge was made by the father for the board of the daughter or for the keeping of the cow, nor by the daughter for her work or for the milk, it was held that there was a valid gift.² The rule is the same where the donor resides in the donee's family.³ Where a parent placed the hand of a slave in the hand of his daughter, declaring at the time that he thereby gave the slave to the daughter, the dominion of the slave was deemed to have passed to the child; and the fact that the donor retained the possession and control of the slave, keeping

¹ *Grangiac v. Arden*, 10 Johns. 293. This is a leading case upon the question of delivery.

² *Martrick v. Linfield*, 21 Pick. 325.

³ *Bennett v. Cook*, 28 S. C. 353.

him on his plantation, was deemed explained by the fact that the slave was a mere youth, who was then of no profit to the donee, and the father kept him to save his daughter from the expense of caring for him.¹ A brother and sister lived with their father on the latter's farm. The father was feeble, and on that account the brother had the whole management of the farm, and provided for the common table of the entire household. The father owned a carriage which was kept, when not in use, in an out-house on the farm, built by the brother at his own expense. The father called the members of the family into the dining-room of the house, and in the presence of all gave the carriage to the daughter, requesting all to witness the gift. At the time the carriage was given it was locked up in the out-house, and no one went nearer to it than the dining-room. Sometime during the day, however, the daughter and her brother, as they had been accustomed to do for two years, washed the carriage. After the time of the gift, the carriage was kept in the out-house, and was used by the members of the family as it had been previously used, except that they no longer asked the father for the privilege of using it, as was formerly their universal habit. The father exacted a promise of his daughter that she would wash and keep it clean, and this was a condition of the gift. This she did. The brother claimed that after the carriage was given to the sister, as she claimed, the father gave it to him; and that he procured a key and went to the carriage house and took it. It was held that there was a valid gift to the daughter.²

¹ *Ivey v. Owens*, 28 Ala. 641.

² *Fletcher v. Fletcher*, 55 Vt. 325. In *Irons v. Smallpiece*, 2 B. & Ald. 551, a father gave his son some colts, about twelve months before his death. The colts, however, remained in the father's possession until his death. About six months before his death the son went to a neighboring market to purchase hay for the

181. PROPERTY GIVEN IN ADVERSE POSSESSION OF THIRD PERSON.—Property that is in the adverse possession of a third person is incapable of gift; for the reason that there can be no delivery.¹ This is very well illustrated by a Massachusetts case. In that instance A held a raffle, the prize being a cow. He decided in B's favor; but C, without A's consent, took the cow from A's premises, and removed her to his own field. A gave B a written instrument, stating that he delivered the cow to him; and then demanded the cow of C, on the ground that he wanted her to deliver to B. A afterward brought replevin for the cow against C, but the trial court decided that he could not maintain the action, for the reason that she had become the property of B; but the Supreme Court held the gift void, and that no property had passed to B. "In the case at bar," said the court, "when the

colts, but finding the price very high he did not purchase. On so reporting to his father, the latter agreed to furnish the son any hay the colts might need at a stipulated price, and the son agreed to pay for it. No hay, however, was furnished until about four days before the father's death. It was held that there was no gift.

The badge of fraud, it was held, was not rebutted, in the case of a gift where the donor retained possession of the slave that was given, by reason of the fact that the donee was the donor's sister-in-law, and lived in his family: *Smith v. Henry*, 2 Bailey, L. 118. A and B were living together in the same room. A died, and B claimed a certificate of deposit issued to A, as a gift. B said that A had promised to give him the certificate, and that he subsequently found it in an old boot kept under a bed in the room in which he and A lived together, and that they had both been in the habit of keeping their valuables in that manner. It did not appear whether he found the certificate before or after A's death. It was held that there was no delivery: *Buschain v. Hughart*, 28 Ind. 449. See where two resided together, and the gift was upheld: *Penfield v. Thayer*, 2 E. D. Smith, 305; *Carradine v. Carradine*, 58 Miss. 286. In West Virginia it is held that if the agent of the donee, residing with the donor, be authorized to accept and receive the gift, so that actual delivery to him is a delivery to such donee, and the gift is in fact so delivered to and accepted by him at the place of the donor's residence, his possession thereof at such place of residence will be insufficient to make it a valid gift: *Dickeschied v. Exchange Bank*, 28 W. Va. 340.

¹ *Scott v. McAlpine*, 6 C. P. (Can.) 302; *Doering v. Kenamore*, 86 Mo. 588.

plaintiff handed the paper to Sonbar, stating that he delivered to him the cow, he had himself no possession of the property, nor could he then exercise any dominion over it. It was in the actual possession of one who held it, not as his servant or his bailee, but against him and in the denial of his right. There can be no delivery of possession by one who himself has none.”¹

182. GIFT OF GROWING CROP.—If a donor say to the donee “I give you the wheat grown in that field,” pointing it out to him, or any other growing or unharvested crop, that is insufficient, for there is no delivery; and even though the donee afterward enter and cut and carry it away, he will acquire no title. In such an instance it was doubted if there could be a symbolical delivery of the crops; and it was also doubted if there could be any delivery without putting the donee “into possession of the soil.”²

183. GIFT OF INCOME OF MILL.—The owner of a mill placed it in the charge of two of his sons for the purpose of managing it, receiving the income thereof, and paying it to his other children and grandchildren. The two sons took possession, kept an account of their transactions, and paid the money as directed, except to the grandchildren, but whose share they paid to their guardian. It was held that this was a completed gift.³

¹ *Miller v. Le Piere*, 136 Mass. 20.

² *Noble v. Smith*, 2 Johns. 52. Clearly Chancellor Kent was mistaken when he intimated that there could be no symbolical delivery; for we elsewhere have shown that a delivery of an ear of corn was sufficient to pass the title to a field of corn then unhusked. See Section 139. Kent's opinions as to what is necessary to constitute a delivery must be received with caution, in the light of modern cases. He drew a very strict rule, following the early English cases. In recent times the rule of delivery has been very much relaxed, unless in England, although a few courts seem to be unaware of the fact.

³ *Poullain v. Poullain*, 79 Ga. 11; S. C. 76 Ga. 420; 72 Ga. 412.

184. GIFT OF REGISTERED BONDS.—A donor purchased certain registered bonds, and had them registered in the donee's name. He retained the bonds until his death, when they were found among his papers. He regularly removed the coupons and collected the interest, and deposited it with a trust company in the donee's name, and he gave to the company a slip containing the donee's signature, to be pasted in the signature book. The donee had the pass-book in which these deposits of interest were credited, but never drew against the deposit. It was shown that the donor had declared that he wanted to create a fund for the donee's benefit. It was held that there was a valid gift, the act of having the bonds registered in the donee's name being a sufficient delivery.¹

185. SHIFTING GIFT FROM ONE DRAWER TO ANOTHER.—Where a donor told his wife, who had the key to the bureau in his house where he kept his securities, that he gave to their daughter two certain bonds, and told her to go to the drawer in which they were kept, and transfer them to another drawer in the bureau, which she did, and so informed him several times, and he a number of times recognized them as the property of his daughter, expressing a wish that they remain uncashed until his daughter became of age; and the interest which arose upon them in his lifetime was, by his direction, paid to the daughter, the mother at all times retaining the key to the drawer; it was held that there was not a sufficient delivery, and that the gift was invalid.²

186. GIFT OF MONEY REPRESENTED BY A NOTE.—There is a distinction between the gift of a note and the gift of the money it represents when collected that some-

¹ Matter of Townsend, 5 Dem. (N. Y.) 147. The bonds amounted to \$120,000.

² Bryson v. Brownrigg, 9 Ves. 1. But see Devol v. Dye, 123 Ind. 321.

times becomes quite material in determining the sufficiency of a delivery. Thus where the holder and payee of a note delivered, shortly before his death, to B, with directions to collect and apply it to certain purposes for the benefit of his wife, but died before the money was collected and applied, it was held that there was no gift, because the proceeds, and not the note, was the thing given; and as such proceeds had not come into the possession of either the wife or B, before the donor's death, there was no sufficient delivery.¹

187. DELIVERY OF SHARES OF STOCK.—In the case of a gift of shares of stock it is not necessary to the delivery to have a formal transfer made upon the books of the company or corporation. Thus a donor owned one hundred and twenty shares of bank stock, included in one certificate. He made an absolute assignment in writing of twenty shares to the donee, and handed the certificate to his wife, to be kept by her and delivered to the donee at his death. At the time the donor was eighty years of age, in failing health, and so continued until his death, which occurred about five months thereafter. It was held that this was an assignment of the twenty shares of stock, and passed the equitable title to it to the donee.²

188. GIFT BY SURETY TO PRINCIPAL OF THE DEBT HE PAYS.—Where a father became surety for his natural sons upon a note, and when it fell due paid the note, took it up, and retained it until his death, his often prior and subsequently repeated declarations, in connection with the sons' testimony, that the payment was a gift of the debt were held sufficient to show a gift, without a delivery to them of the note. It was considered that the money paid

¹Thompson v. Dorsey, 4 Md. Ch. 149.

²Grymes v. Hone, 49 N. Y. 17.

was the gift, and the payment to the creditor was the delivery, constituting an irrevocable gift.¹

189. GIFT BY DEED OR WRITING DISPENSES WITH DELIVERY OF ARTICLE GIVEN.—A delivery of the thing given may be dispensed with only in one instance, it is believed, and that is where the donor executes a written instrument of gift. This instrument may be a simple writing, duly signed by him, or a duly acknowledged deed. Both stand on the same plane. But the writing or deed must be delivered, either actually or constructively.² The writing or deed is accepted as the equivalent of proof of delivery.³ “A gift by deed is good between the parties,” said the West Virginia Court of Appeals, “if it goes into effect at once, without delivery, for the delivery of the deed answers the place of the delivery of the property, when the property is capable of actual delivery.”⁴ But if in the instrument the donor reserves the title to the property, until his death, or until a specified time, then the gift is void; for it stands on a foot-

¹ After the death of the father the sons executed to the administrator a note for the amount of the payment, with interest, on which a judgment at law was rendered; but upon filing a bill in chancery setting up the gift, a perpetual injunction against its enforcement was decreed: *Browns v. Brown*, 4 B. Mon. 535.

² *Ruckman v. Ruckman*, 4 N. J. L. Jr. 134; *In re Way*, 10 Jur. N. S. 836; S. C. 34 L. J. Ch. 49; 13 W. R. 149.

³ *Wycke v. Greene*, 11 Ga. 159; *Irons v. Smallpiece*, 2 B. & Ald. 551; *Banks v. Marksberry*, 3 Litt. 275; *Mims v. Sturtevant*, 18 Ala. 359; *Blakey v. Blakey*, 9 Ala. 391; *Forney v. Ramey*, 77 Ia. 549; *Hynson v. Terrey*, 1 Ark. 83; *Sewall v. Glidden*, 1 Ala. 52.

⁴ *Hogue v. Bierne*, 4 W. Va. 658, 671; *Powell v. Leonard*, 9 Fla. 359; *Wycke v. Greene*, 11 Ga. 159; *Ewing v. Ewing*, 2 Leigh. 337. A gift by deed of “all the estate which he owns at the date of deed, or should own at his death,” does not pass money of which he was the owner at his death, though it was in the donor’s possession at the date and delivery of the deed: *Butler v. Scofield*, 4 J. J. Mar. 139; *Anon.*, 3 Swanst. 400, note; *Young v. Power*, 41 Miss. 197; *Walker v. Crews*, 73 Ala. 412; *Flower’s Case*, Nov. 67; *Bohn v. Headley*, 7 H. & J. 257; *Fri-bie v. McCarty*, 1 Stew. & Por. 56; *MEwen v. Troost*, 1 Sneed, 185; *Caines v. Marley*, 2 Yerg. 582; *Nicholas v. Adams*, 2 Whart. 17.

ing with a promise to make a gift. The deed or writing, to be effectual, must be delivered with the intention to at once not only transfer the title, but also the possession of the property, to the donee. There must be no postponement of that event.¹ Upon this question, however, as we have elsewhere shown, there is some variance of opinion; for the owner of personal property may give it away by deed, and in the instrument reserve to himself the right to use it during his natural life.²

190. UNSEALED INSTRUMENT NOT SUFFICIENT TO DISPENSE WITH A DELIVERY OF THING GIVEN—ESTOPPEL.—In the previous section no distinction is made between a writing under seal and one not sealed, but in a few cases this distinction is made. Thus, in Alabama it is said that a gift by sealed deed is good because the donor is estopped from saying that the property has not passed to the donee, but no written declaration, not under seal, will consummate the gift. In the case of a gift by writing, it is said that the doctrine of estoppel does not apply. "Hence, a parol declaration of gift (whether verbal or by unsealed writing) stands upon the footing of a mere promise to give." The

¹ Connor v Trawicks, 37 Ala. 289.

² A will executed subsequently to the execution of the deed creates no presumption that the latter had never been delivered, or that it was not considered a valid instrument by the parties: Lewis v. Amer, 44 Tex. 319. In Louisiana, under the civil law, a gift by deed was valid, even though the donor die without having made any delivery of it, not having made any other disposition of the property given: Holmes v. Patterson, 5 La. 693. A deed of gift of a policy of insurance delivered to a third person was held good, even though the donor retained possession of the policy; and the donor having collected the amount due on a policy when surrendered, as provision for such collection was made, he was compelled by the vice-chancellor to secure to the amount of the value of the policy assigned by the deed: Fortesque v. Barnett, 3 My. & K. 36. Where a statute required the deed of gift of a slave to be acknowledged and recorded, a defective acknowledgment and a failure to record was held not to prevent the deed being considered as a parol declaration of the donor's wishes, and if a delivery of the slave was shown, the gift, even as a *mortis causa*, was valid: Sewall v. Glidden, 1 Ala. 52; Cranz v. Kroger, 22 Ill. 74; Lohff v. Germer, 37 Tex. 578.

court denied the claim made that title by deed passed because the delivery of the deed was a symbolical delivery, saying: "It is rather upon the principle of estoppel that, for the purpose of consummating a gift, the delivery of a deed is as effectual as the delivery of the property." Again it is said: "Although it is true that in modern times the seal has been stripped of much of its ancient force, the doctrine of estoppel by deed is still maintained. Hence, where a gift of personal property is made by deed, the delivery of the deed transfers the right to the property, for the reason that the form of the instrument imports a consideration for the transfer, and the maker of the deed is estopped thereby from asserting that he has not granted to the donee a power of control and dominion over the property conveyed by the deed."¹

191. GIFT BY DEED OF REVERSIONARY INTEREST.—The assignment by deed of an equitable reversionary interest in personal property is not to be treated as a mere agreement; and, although it be voluntary, it is not an incomplete gift for lack of a delivery, but is a transfer of the beneficial interest of the assignor.²

¹ Connor v. Trawick, 34 Ala. 289. Suppose, however, a statute has wiped out all distinction between sealed and unsealed writings as instruments of evidence, would not an unsealed instrument be as effective for the purpose of a delivery as a sealed one? We think it would. Earlier cases in Alabama support the rule announced in the text: M'Cutchen v. M'Cutchen, 9 Port. (Ala.) 650, 656; Perry v. Graham, 18 Ala. 822; Summerlin v. Gibson, 15 Ala. 406; Thompson v. Thompson, 2 How. (Miss.) 737; Miller v. Anderson, 4 Rich. Eq. 1; Busby v. Byrd, 4 Rich. Eq. 9; Jaggars v. Estes, 3 Strobb. Eq. 379; Morrow v. Williams, 3 Dev. 263. Dispute in the authorities alluded to: Gammon Theological Seminary v. Robbins, 128 Ind. 85; Payne v. Powell, 5 Bush. 248 (gift held void); Warriner v. Rogers, 42 L. J. Ch. 581; 16 L. R. Eq. 340; 21 W. R. 766; 28 L. T. N. S. 863. J was indebted to P by bond. P by deed poll, in consideration of natural love for E, the wife of J, agreed that this bond, and all benefit and advantage to be had thereby, should, after his death, be wholly for the use of E and her issue by J. After this P put the bond in suit, but died before payment of it. It was held that this was a revocation of the gift: Richardson v. Sedgwick, 3 Bro. P. C. 576.

² Vogle v. Hughes, 2 Sm. & G. 18; S. C. 18 Jur 341; 23 L. J. Ch. 328; Keke-

192. DEED INSUFFICIENT TO OPERATE AS A DELIVERY.—There are a few cases which hold that even a deed is not sufficient to operate as a delivery; and if the property remains in the possession of the donor the gift is void.¹ But if there has been a possession of the property transmitted by the donor to the donee it has been held that the deed estops the donor from denying that a gift was not intended and that no delivery had been made.²

193. DEED OR WRITING IN A DONATIO MORTIS CAUSA.—It has been directly decided that a *donatio mortis causa* cannot be perfected by the delivery of a deed without a delivery of the thing given. This is upon the ground that a gift made in this way is in contravention of the statute prescribing certain formalities in the execution of a will, and that to thus allow the deed to have effect, when not executed as those statutes require wills to be executed, would be to overturn their provisions.³ But as there is no difference in the requisitions to make a perfect delivery in a *donatio inter vivos* and *donatio mortis causa*, it is difficult to see why any difference should be drawn in this instance; and in view of the modern cases it may well be doubted if this old rule is any longer the law.

194. DELIVERY OF DEED AT RECORDING OFFICE.—If the donor deliver the deed at the office of register of deeds for the purpose of registration, that is a sufficient de-

wich v. Manning, 1 De G., Mac. & G. 176. The case of Meek v. Kettlewell, 1 Hare, 464; S. C. 1 Ph. 342, is practically overruled.

¹ Marshall v. Fulgham, 4 How. (Miss.) 216; McWillie v. Van Vacter, 35 Miss. 428, 443; Carradine v. Collins, 7 S. & M. 428; Smith v. Downey, 3 Ired. Eq. 268; Thompson v. Thompson, 2 How. (Miss.) 737.

² Newell v. Newell, 34 Miss. 385.

³ Smith v. Downey, 3 Ired. Eq. 268; Tate v. Hilbert, 2 Ves. Jr. 111; Smith v. Ferguson, 90 Ind. 229.

livery to pass the title;¹ but a mere leaving of the deed at that place, without saying more, has been doubted as a sufficient delivery.²

195. ORDER TO AGENT TO DELIVER GIFT TO DONEE.—A written order to his agent to deliver the subject-matter of the gift to the donee is insufficient to constitute a delivery, if the donor resume the possession before actual delivery to the donee.³ But suppose the agent should accept the command of the order, and agree with the donee to deliver the property to him; would it not be a good gift? Would he not cease to be the agent of the donor and become that of the donee? We think he would, and the gift would be valid.

196. DELIVERY OF RECEIPT SUFFICIENT.—A receipt given by a depositary of property may be a sufficient delivery of the property when such receipt is delivered to the donee of property. Thus a bond was in the hands of the donor's attorney for the purpose of collection. An action had been brought upon it in court. The owner gave it verbally to the donee, and gave him the attorney's receipt for it. This was held to be a valid gift of the bond, and that he could recover from the attorney the proceeds of the bond which he had collected.⁴

197. CONSIDERATION FOR DEED—SLAVES.—In Kentucky a gift by deed was held to dispense with an actual

¹ *Frisbie v. McCarty*, 1 Stew. & Por. 56; *Mallett v. Page*, 8 Ind. 364; *Horn v. Gartman*, 1 Fla. 63; *Ruckman v. Ruckman*, 4 N. J. L. Jr. 134.

² *M'Ewen v. Troost*, 1 Sneed, 185.

³ *Picot v. Sanderson*, 1 Dev. L. 390.

⁴ *Elam v. Keen*, 4 Leigh, 333; *Jones v. Silby*, Prec. in Ch. 300; *Stephenson v. King*, 81 Ky. 425, 432. A delivery of a receipt for stock was held insufficient: *Ward v. Turner*, 2 Ves. Sen. 431, but this ruling cannot be regarded as stating the law as laid down by modern authorities. A warehouse receipt is sufficient: *Gallaudet's Case*, 9 Ct. of Cl. 210.

delivery only when there was a good consideration ; but that the relationship of a father to his child was a sufficient consideration to uphold the gift.¹ If there was no consideration for the deed, then the deed must be recorded, by statute, or the slave delivered.²

198. GIFT BY DEED OF UNDIVIDED INTEREST.—Where a gift was made by deed of an undivided one-fourth part of a chose in action, it was deemed a valid gift, which, however, could not be enforced in a court of law but could be in equity ; yet if it was to be construed as a gift of the money represented by the chose in action, the gift was invalid.³

199. DEED NOT PRODUCED—DESTROYED.—If the gift was by deed and the property given was also actually delivered, it is not necessary, in order to support the gift, to produce the deed ; for the fact of the gift may be shown by parol. But the withholding of the deed casts suspicion over the entire transaction.⁴ So if it is shown that the deed was never delivered, but it was destroyed by the donor, the donee can take no advantage of the fact that the instrument was once in existence.⁵ But if such a retention is shown as is not inconsistent with the presumption of a delivery, then the donor cannot affect the validity of the gift by destroying the deed ; and slight evidence of its contents is sufficient to establish the gift.⁶

200. WRITING AFFIXED TO THE ARTICLE GIVEN.—If the article given is not delivered, then writing the terms

¹ *Bank v. Marksberry*, 3 Litt. 275.

² *Howard v. Samples*, 5 Dana, 306 ; *Chadoin v. Carter*, 12 B. Mon. 383 ; *Mahan v. Mahan*, 7 B. Mon. 579 ; *Pyle v. Maulding*, 7 J. J. Mar. 202. In Mississippi the same rule applied to the gift of a slave : *Marshall v. Fulgham*, 4 How. 216.

³ *Hogue v. Bierne*, 4 W. Va. 658.

⁴ *Blakey v. Blakey*, 9 Ala. 391.

⁵ *Reid v. Butt*, 25 Ga. 28.

⁶ *Mims v. Sturtevant*, 18 Ala. 359, 365.

of the gift upon the article, however certain they may be, will not constitute the transaction a gift. Thus a person wrote on the parcels of property the names of the persons for whom they were intended, and requested a person to see them delivered to the donees; yet it was held that there was no gift, for a want of delivery.¹ But in all such instances the writing can be used in determining the intention of the donor; and where the question of delivery is a close or even doubtful one, resort may be had to this fact of the writing to aid the upholding of the gift.²

201. DONOR RESERVING INTEREST IN OR USE OF ARTICLE GIVEN BY PAROL.—There is some conflict in the cases, whether in a parol gift the donor can reserve an interest in the article given, especially if the reservation is for the life of the donor, and the retention of the possession of it is essential to its enjoyment. Such a gift, by some of the cases, is void.³ Going through the form of a delivery will not make the gift valid.⁴ Thus where a father assigned in trust for his son a certificate of deposit, reserving the right to use the money during his life, but directing the residue to be paid to the son at the donor's death, it was held a void gift, although the assignee surrendered the certificate and took out a new one during the life of the assignor.⁵ But where a father, desiring, during his lifetime, to distribute his property

¹ *Bunn v. Markham*, 7 Taunt. 224; *Young v. Young*, 80 N. Y. 422; *Montgomery v. Miller*, 3 Redf. 154; *Trimmer v. Darby*, 25 L. J. Ch. 424.

² *Devol v. Dye*, 123 Ind. 321.

³ *Cox v. Hill*, 6 Md. 274, 284; *Anderson v. Thompson*, 11 Leigh, 439; *Miller v. Anderson*, 4 Rich. Eq. 1; *Busby v. Byrd*, 4 Rich. Eq. 9; *Barker v. Barker*, 2 Gratt. 344; *Ragsdale v. Norwood*, 38 Ala. 21; *Kirkpatrick v. Davidson*, 2 Kelly (Ga.), 297.

⁴ *Busby v. Byrd*, 4 Rich. Eq. 9; *Henderson v. Adams*, 35 Ala. 723; *Yarborough v. West*, 10 Geo. 471; *Booth v. Terrell*, 16 Geo. 20; *Booth v. Terrell*, 18 Geo. 570.

⁵ *Withers v. Weaver*, 10 Pa. St. 391.

among his children, reserving its use to himself, conveyed a tract of land to his son and took back a note for the purchase-money, payable to his heirs four years after his decease, with interest payable to himself, but to cease at his death; the note being secured by a mortgage on the land with like conditions, it was held that the transaction constituted a valid gift *inter vivos* to the heirs of the principal sum, the interest of the donor making it necessary for him to hold the notes, while he lived, for his own security; and that the placing of the mortgage on record was all he could do consistent with his own rights; and he became a trustee for the heirs, and they alone could enforce payment of the principal.¹

202. DONOR RESERVING INTEREST IN OR USE OF ARTICLE GIVEN BY DEED.—A reservation of an interest in the gift by the donor, where the gift is evidenced by deed or a written instrument, is a valid reservation, and does not avoid the gift.² Such an instrument becomes operative as a conveyance *in presenti*, so as to vest the title in the donee, although the enjoyment of the property may be postponed until after the death of the donor.³ And it has

¹ *Love v. Francis*, 63 Mich. 181. In this case the father had gone so far as to secure a foreclosure for the interest and the principal, but the foreclosure as to the latter was held to be a nullity and not binding on the heirs. The possession of the life tenant is not adverse to the remainderman: *Banks v. Marksberry*, 3 Litt. 275; *Anderson v. Dunn*, 19 Ark. 650.

Where a mother gave her children a slave, retaining a life interest therein, the life interest was held void and the gift good: *Vass v. Hicks*, 3 Murphy, 493. A gift to a trustee for the donee of a sum of money, reserving the interest for life of the donor, is a valid gift of the principal at the donor's death: *Reed v. Barnum*, 136 Ill. 388.

² *Thompson v. Wornack*, 9 La. Ann. 555; *Summerlin v. Gibson*, 15 Ala. 406.

³ *Summerlin v. Gibson*, 15 Ala. 406; *Adams v. Broughton*, 13 Ala. 731; *Wilks v. Greer*, 14 Ala. 437; *Caines v. Marley*, 2 Yerg. 582; *Bohn v. Headley*, 7 H. & J. 257; *Thompson v. Wornack*, 9 La. Ann. 555; *Banks v. Marksberry*, 3 Litt. 275. In Mississippi such a gift was held void, because there was no actual delivery of the slaves given, and the writing did not dispense with a delivery: *Thompson v. Thompson*, 2 How. 737; *Horn v. Gartman*, 1 Fla. 63.

been held that, although the deed is absolute on its face, the reservation may be shown by parol.¹

203. RESERVATION OF RIGHT TO USE PART OF FUND GIVEN.—If the donor reserves the right to use a part of the fund given, without designating how much or what part of it, or to use the whole of it if he need so much for his personal comfort or business, then the gift is incomplete, because the donor has not relinquished his dominion over the fund given. So the same would be if several articles were given, and the right reserved to take a part or all of them; or even of a single article.² But where A signed a memorandum, in which he particularized some Russian bonds, and to whom he would give them, and at the same time delivered them to B, verbally directing him that he was to pay him, A, the interest for life, and hold the bonds for the persons named in the paper after his death, it was held that there was a valid gift to the persons named in the memorandum.³

204. GIFT OF BONDS WITH RESERVATION OF THE ACCRUING ANNUAL INTEREST—TRUST.—The owner of certain coupon bonds placed them in two envelopes, and indorsed upon each envelope a memorandum, signed by him, to the effect that a specified number of the bonds therein belonged to his son W., and the remainder to his son J., but that the interest to become due thereon was “owned and reserved” by him during his life, and that at his death “they belong absolutely and entirely to them and their heirs.” He exhibited the packages, with the indorsements, to the wives of the two sons, and said that

¹ *Summerlin v. Gibson*, 15 Ala. 406.

² *Daniel v. Smith*, 75 Cal. 548; S. C. 64 Cal. 346; *Basket v. Hassell*, 107 U. S. 602. Interest of a mortgage forgiven: *Scales v. Maude*, 6 De M. & G. 43; S. C. 25 L. J. Ch. 433; 1 Jur. N. S. 1147.

³ *Langley v. Thomas*, 26 L. J. Ch. 609.

what he had thus done was in pursuance of a settled purpose, and that he believed he had made a valid disposition of the bonds. At that time he lived at W.'s house, where there was a safe formerly owned by him, but which he had given to a son of W., reserving the right to use it; and which he did use as a deposit for his valuable papers, but rarely going to it, being in the habit of depositing and removing the papers when W. requested it. After exhibiting the packages he placed them in the safe. After this the packages were generally kept, not in the pigeon holes used by him, where the bonds had been previously kept, but in the compartment in the safe where the papers of W. were kept, and there they were found after the death of the donor, which occurred eighteen months after he declared that he made a gift of the bonds. As installments of interest became due he cut off the coupons, W. sometimes assisting him. W. never exercised any ownership over the bonds as against his father, and they were at all times under the control of the latter, up to his death. J., the other donee, never had any control over the bonds, nor access to the safe. At one time the father, when solicited for a loan, said he supposed he might, with his sons' consent, take some of their bonds; and he told another person that what he had left he had given to W. and J. The donor had, before making the indorsements, given J. \$1,000, and he afterward took a \$1,000 bond from one of the packages, which was stated in the indorsement as belonging to J., and gave it to a third person. It was decided that these facts did not show a valid executed gift, for the reason that the donees at no time during the life of the donor had exclusive possession of the bonds, or the legal right to such possession; nor could the gift be upheld as a trust.¹

¹ *Young v. Young*, 80 N. Y. 422; S. C. 36 Am. Rep. 634; previous decision, 5 N. Y. Wkly. Dig. 109.

But where there was no reservation of interest, under facts very similar, the same court upheld the gift.¹

205. GIFT OF NOTE WITH RESERVATION OF ACCRUING INTEREST.—If the owner of a note give it to a third person upon the understanding that the donor shall receive annually the interest which accrues upon it during his life, and at his death the proceeds of the note is to be divided among certain designated persons, the gift is good if the donor die without having revoked it. “We think,” said the court, “therefore, that the trial court did not err in holding such disposition as is here shown of the note in question a valid gift *inter vivos*. But, even if that were not so, upon the facts here presented, and the law, as we understand it to be, we would be inclined to hold that it would constitute a good gift *mortis causa* of the notes in question.”² In the case cited there was a delivery of the instrument evidencing the debt. There is no doubt that

¹Trow v. Shannon, 78 N. Y. 446, affirming 8 Daly, 239. A payee of three promissory notes executed the following indorsement, preceded by the delivery of them to the indorsee: “I bequeath—pay the within contents to A, or his order, at my death.” There was a single witness to his signature. In the act of the delivery of the notes the payee expressed an intention to be “master of them as long as he lived.” It was held that the gift, because of the reservation, was void as an *inter vivos*, and also as a testamentary gift, because there was only one witness: Mitchell v. Smith, 33 L. J. Ch. 596; 12 W. R. 941; 16 L. T. N. S. 801; 4 De G., J. & S. 422.

²Seavey v. Seavey, 30 Ill. App. 625; Doty v. Willson, 47 N. Y. 580; Stone v. Hackett, 12 Gray, 227 (stocks with income reserved for life); Martin v. Funk, 75 N. Y. 134 (deposit in bank and accruing interest used by donor); Miner v. Rogers, 40 Conn. 512 (deposit in bank and interest used by donor); Gerrish v. New Bedford Inst., 128 Mass. 159 (deposit in savings bank and dividends used by donor); Smith v. Ossipee Valley, etc., Bank, 64 N. H. 228; S. C. 9 Atl. Rep. 792 (deposit in bank with express reservations of accruing dividends); Eastman v. Woronoco Savings Bank, 136 Mass. 208 (deposit in bank with reservation of interest); Lines v. Lines, 142 Pa. St. 149 (gift by deed). A gift of a bond to a trustee with directions to pay the interest accruing thereon to a certain person, without limitation as to the duration of the trust, is, upon the donor's death, equivalent to a gift to such person of the principal: Reed v. Barnum, 36 Ill. App. 525. This case, however, was reversed: 136 Ill.

a delivery to the donee and a redelivery to the donor for the purpose of collecting the interest would be a sufficient delivery to make the gift valid. But suppose there was no delivery, would the gift be valid? If the gift was evidenced by writing, there is no doubt of its validity. Perhaps, if the words of the gift are clear, especially if evidenced by indorsement on the instrument given, no further delivery is required; just as the indorsement of a credit on a note or a part payment is sufficient to make the gift valid, without an actual delivery of the note itself; for the donor has a right to retain the note for his own security.¹

206. GIFT TO BE RETURNED IF DONOR MAKE DEMAND FOR IT IN HIS LIFETIME.—Where a donor executed and delivered a note to the donee as a gift, sealed up in an envelope which was not to be opened until after his death, and which was to be returned to him if he requested it during his lifetime, and no such request was made, it was held that the gift was valid.² In this instance the note was executed by the donor, and there was a consideration for it; but if the note had been the note of a third person the same result would have been reached.³

¹ *Green v. Langdon*, 28 Mich. 221; *Francis v. Love*, 63 Mich. 181. But see Section 154 as to gift a part of a chattel.

Where the gift was evidenced by a written instrument, and consisted of a transfer to the donee of a mortgage, but the interest on the mortgage and the money thereby secured were to belong to the assignor during his lifetime, the gift was held invalid, though the written instrument and the mortgage, but not the bond secured, were delivered to the donee: *In re Wirt*, 5 Dem. (N. Y.) 179.

² *Worth v. Case*, 42 N. Y. 362.

³ In another case from the same State, it is said that the donor must be "in no condition to repossess himself of the subject-matter of the gift or to recall the same." *Little v. Willets*, 55 Barb. 125. It must be admitted that the case is on the border line. Three judges dissented. In another case it was said that "a total exclusion of the power or means of resuming possession by the donor is not necessary" (*Cooper v. Burr*, 45 Barb. 9); but this language does not refer to a resuming of the title to the thing given—not to a resumption of dominion over the article.

207. HIRE OF SLAVE, ANIMAL, OR CHATTEL.—The owner of a slave or animal may make a gift of the use or hire of such slave or animal for any period of time, by delivering it to the donee or by delivering it to the person hiring it, and such a gift is not revocable. Of course the same is true of any chattel. In such an instance the donee may bring an action against the person hiring them for their hire.¹

208. PAROL GIFT TO DONEE FOR LIFE, WITH REMAINDER OVER TO THIRD PERSON.—A gift of a chattel to A for life, by parol, with remainder over to B, is void as to the remainder, but the absolute property vests in A and does not revert on his death to the donor.² Such a remainder, however, may be created by deed or a writing.³

209. REPOSSESSION BY OR DELIVERY TO DONOR.—If a gift *inter vivos* has been completed, the donor cannot defeat it by regaining the possession of the thing given. Thus a mother sold her real estate and caused two of the purchase-money notes to be made payable to her three-

¹ Pope v. Randolph, 13 Ala. 214.

² Adams v. McMichael, 37 Ala. 432; Betty v. Moore, 1 Dana, 235; Powell v. Brown, 1 Bail. L. 100; Martin v. Martin, 15 La. Ann. 585; Harris v. McLaran, 30 Miss. 533; Booth v. Terrell, 16 Geo. 20; S. C. 18 Geo. 570; 26 Geo. 447; Fitzhugh v. Anderson, 2 Hen. & M. 289; Gordon v. Green, 10 Geo. 534; Kirkpatrick v. Davidson, 2 Kelly (Ga.), 297; Johnson v. Waters, 111 U. S. 640; Maxwell v. Harrison, 8 Geo. 61; Payne v. Lassiter, 10 Yerg. 507; Williams v. Conrad, 11 Humph. 411; Hallum v. Yourie, 1 Sneed, 368; Price v. Price, 5 Ala. 578; Vaughn v. Guy, 17 Mo. 429 (even by deed void); Dougherty v. Dougherty, 2 Strob. Eq. 63. *Contra*, Brummet v. Barber, 2 Hill (S. C.), 543; Pemberton v. Pemberton, 22 Mo. 338; Halbert v. Halbert, 21 Mo. 277; Thompson v. Wormack, 9 La. Ann. 555.

³ Kirkpatrick v. Davidson, *supra*; Cox v. Hill, 6 Md. 274, 286; Harris v. McLaran, 30 Miss., p. 568; Hayden v. Stinson, 24 Mo. 182; Bradley v. Mosley, 3 Call. 50; Pillot v. Landon, 46 N. J. Eq. 310; London v. Turner, 11 Leigh, 403; Andree v. Word, 1 Russ. 260; Greene v. Ward, 1 Russ. 262; S. C. 4 L. J. Ch. 99; Higinbotham v. Rucker, 2 Call. 313; Brown v. Kelsey, 2 Cush. 243; Keene v. Macey, 3 Bibb. 39; Wright v. Cartwright, 1 Burr, 282.

year-old son, and delivered them to his father for safe keeping. The father died, and the mother as executrix of his estate came into possession of the notes. She purchased of the maker of these two notes a tract of land, and in part payment cancelled and surrendered them. It was held that the repossession of the notes did not revoke the gift, that the lands in her possession were chargeable with a trust to the extent of the amount of the gift; and that she could not defend on the ground that the land she had sold, and for the purpose of which the two notes were given, was held by her as a trustee.¹ In the case of a gift to an infant child, the latter cannot so redeliver the subject of the gift to the donor as to divest himself of the title conferred in perfecting the gift; nor can the person to whom it was delivered for the infant consent that the donor may resume the article given, so as to deprive the donee of the benefit of the gift.² So where a father executed to his married daughter a deed for a slave, but never delivered it, saying, however, that it was his deed and that the slave belonged to her, sent the slave to her, and her husband declined, without her knowledge of the gift, to receive it, because he thought it was her separate property, though the deed did not make it such, returned the slave to the father with a note, which the father thought came from the daughter, requesting that he would do the best he could for her; and the father, on the slave's return, announced that he would put it to work and account to the daughter for it; this was held to show a valid delivery, and a retention of the possession not inconsistent with the validity of the gift. While the court did not pass upon the sufficiency of the delivery of the deed, yet it remarked that the father's

¹ *Rinker v. Rinker*, 20 Ind. 185.

² *Easley v. Dye*, 14 Ala. 158; *Sewall v. Glidden*, 1 Ala. 52.

"continued possession of the deed is not necessarily inconsistent with the idea of a delivery in fact or in law."¹ So where the donee of an unindorsed note, on its delivery to him by the donor, handed it back, with a request that he keep it until called for, or collect it and pay the proceeds over; this was held not to invalidate the gift, and that the donee could maintain an action on the note after the donor's death.² Nor is the gift annulled if the note is redelivered to the donor, with an agreement that he may collect and use so much of the proceeds as he needs for his support in case he should become poor.³

¹ *Mims v. Sturtevant*, 18 Ala. 359.

² *Grover v. Grover*, 24 Pick. 261. By a redelivery, especially if accompanied by evidence tending to show it, the jury may infer a rescinding of the gift: *Sanderlin v. Sanderlin*, 24 Ga. 583.

³ *Marston v. Marston*, 64 N. H. 146; *Watson v. Bradshaw*, 6 Ontario App. 666. Where it was held that an indorsement of a note by the payee was essential to pass the title, it was said that an allegation of the donee that the donor "give her said note, but retained it in her possession as her agent to collect the interest thereon for her," did not show a delivery: *Hitch v. Davis*, 3 Md. Ch. 266. Even as against creditors with notice the gift will be sustained when the donor comes into its repossession: *Madden v. Day*, 1 Bail. L. (S. C.) 587. When the donor resided in the family, a reservation to ride whenever he desired the horse he gave, was held not to avoid the gift: *Bennett v. Cook*, 28 S. C. 353. So in the case of a gift of a slave, a reservation of a right to "borrow" under certain circumstances, or to receive "something like hire," if the donor should stand in need, it was held to be a condition subsequent, and did not invalidate the gift: *McKane v. Bonner*, 1 Bail. L. (S. C.) 113; *Taber v. Willets*, 44 Hun, 346. A father took out a policy of insurance in his own favor on the life of his minor son to whom he promised to give the policy at his majority. The son having married asked that it be given him before that time and made payable to his wife, and the father, acquiescing, delivered it to him. He afterward returned it to his father in order that he might have it changed so as to run to the wife, and he forwarded it through the local agent, with the request that it be changed accordingly. The company substituted a policy drawn in the wife's favor and sent it to the local agent who received it on or about the day the son died and afterward delivered it to the father, who retained it, claiming the proceeds of the policy. It was held that the gift of insurance was perfected by the delivery of policy, the order for substitution and the subsequent transfer by the company without objection, and that a bill to enjoin the company from paying it to the wife would not lie: *Crittenden v. Phoenix Mutual Life Ins. Co.*, 41 Mich. 442; *In re Malone*, 37 Leg. Int. 63; S. C. 38 Leg. Int. 303. In *Little v. Willets*, 55

210. DONEE HAS BURDEN TO SHOW THAT REDELIVERY WAS NOT A RESCISSION OF THE GIFT.—The burden is always upon the donee to show that there was a valid gift. If a gift is once shown, then the donor, if he so desires, has the burden to show that there was a rescission. But if the article has been voluntarily redelivered to the donor by the donee, or even if the donor is found in possession without it being shown how he came into the possession, then the burden is cast upon the donee to show that there was not a rescission of the gift, and that it is yet valid and effective.¹

211. REDELIVERY OR REPOSSESSION OF DONATIO MORTIS CAUSA.—There are many expressions contained in the reported cases concerning instances of gifts *mortis causa*, that not only must there be a delivery—such a transaction as the law recognizes as a delivery—but “there must be a continuing possession” until the donor’s death.² The Supreme Court of Maine said, speaking of the delivery in a gift *mortis causa*: “It not only requires the delivery to be actual and complete, such as deprives the donor of all further control and dominion, but it requires

Barb. 125, it was held that a gift of money from a husband to his wife, which she immediately returns to him with instructions to use it as her agent, cannot be sustained as against the husband’s creditors: *Love v. Francis*, 63 Mich. 181; retention by father of a gift to son, the father reserving a life interest of the income. See generally *Hill v. Chapman*, 2 Brown Ch. 612, and Section 122.

¹ We can cite no case exactly in point; but we believe that the practice shown by the reported cases bears out this assertion. Of course, in showing his possession, the donor will often aid the donee by explaining how and under what circumstances he came into possession. See *Taber v. Willets*, 44 Hun. 346; *McKane v. Bonner*, 1 Bail. L. (S. C.) 113; *Ivey v. Owens*, 28 Ala. 641. In Louisiana, in 1874, all gifts between husband and wife were revokable, and the restoration by her to him of the property given, followed by a subsequent conversion by him, was held to show a rescission of the gift: *Succession of Hale*, 26 La. Ann. 195.

² *Huntington v. Gilmore*, 14 Barb. 243. But see *Hill v. Chapman*, 2 Brown Ch. 612.

the donee to take and retain possession till the donor's death. Although the delivery may have been at one time complete, yet this will not be sufficient, unless the possession be constantly maintained by the donee. If the donor again has possession, the gift becomes nugatory. And public policy requires these rules to be enforced with great stringency, otherwise the wholesome safeguards of our testamentary laws become useless. It is far better that occasionally a gift of this kind fail than that the rules of law be so relaxed as to encourage fraud and perjury."¹

212. DONEE OF IMPERFECT GIFT MAY MAINTAIN AN ACTION AGAINST A WRONG-DOER.—It is not necessary that a donee should have a valid title, perfected by delivery, to the article attempted to be given, in order to maintain an action against one wrongfully depriving him of its possession. Mere right of possession is sufficient to enable him to maintain the action; he has such a special property as to be able to maintain an action against a mere wrong-doer, though the donor may resume the thing given.²

213. PROOF OF DELIVERY.—Delivery may be proved, like proof of any other fact, inferentially; direct testimony is not essential. The acts and conduct of the parties may be sufficient to clearly show a delivery.³

214. QUESTION FOR JURY.—If the facts of the transaction are clearly proved and uncontradicted, and the infer-

¹ Hatch v. Atkinson, 56 Me. 324; Dunbar v. Dunbar, 80 Me. 152. In Vermont it was held a note, the separate property of herself, could be the subject of a valid gift *mortis causa* by a wife to her husband, even though he does not reduce them to possession during her life, the delivery of them to him by her for such purpose vesting in him a good legal title: Caldwell v. Renfrew, 33 Vt. 213; Scot v. Reed, 25 Atl. Rep. 604.

² 2 Williams Sanders 217 *b*, note *d*. See Phillips v. McGrew, 13 Ala. 255; Bourne v. Fosbrooke, 18 C. B. (N. S.) 515; S. C. 34 L. J. C. P. 164; 11 Jur. N. S. 202.

³ Isaac v. Williams, 3 Gill. 278.

ence to be drawn from them also lead to a certain and uncontroverted conclusion, or, in other words, if only one inference or set of inferences can be drawn from the facts proved, then the question whether there was a gift is one for the court; but if the facts are disputed, either as to the alleged donor's intention to give, or his alleged attempt to make a delivery; or if the transmission of the possession from the donor to the donee is ambiguous, then it is a question for the jury, under the instructions of the court, whether there was an intent to give and whether there was such a transaction as amounted to a delivery.¹

¹ *Hansell v. Bryan*, 19 Geo. 167. "And in every instance there was the repeated declarations of the plaintiff's father, that he had given; so that the jury were authorized to infer from them everything that was necessary to the consummation of a legal gift, including necessarily the intention to give, the act of giving, the delivery, and the consent to accept." *Reid v. Colcock*, 1 N. & McC. 592; *Grangiac v. Arden*, 10 Johns. 293; *Carradine v. Collins*, 7 S. & M. 428; *Caldwell v. Wilson*, 2 Speer L. 75; *Nichols v. Edwards*, 16 Pick. 62; *Hunt v. Hunt*, 119 Mass. 474; *Young v. Power*, 41 Miss. 197. If the facts are undisputed, the court must direct the verdict: *Oldenberg v. Miller*, 82 Mich. 650; *Porter v. Gardner*, 60 Hun, 571.

CHAPTER X.

ESTABLISHMENT OF GIFT.

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| <p>215. <i>Lex Loci</i> Determines Validity of Gift.</p> <p>216. Burden to Show Gift is on Donee.</p> <p>217. Essentially a Matter of Evidence.</p> <p>218. Words of Gift.</p> <p>219. Particularity of Proof.</p> <p>220. Sufficiency of Evidence.</p> <p>221. Number of Witnesses.</p> <p>222. Prior Declarations of Donor.</p> <p>223. Declarations at Time of Gift.</p> <p>224. Declarations Made Subsequent to the Time of the Alleged Gift.</p> <p>225. Subsequent Declarations when Transaction is Doubtful or Donee in Possession.</p> <p>226. Declarations of Drunken Donor Attempting to Regain Possession.</p> <p>227. Inoperative Deed to Show Declarations of a Gift.</p> <p>228. References in Will to Gift.</p> <p>229. Declarations of Donee.</p> <p>230. Declarations to Prior Gift.</p> <p>231. Declarations Insufficient to Establish Gift.</p> <p>232. Declarations as to Other Gifts.</p> <p>233. Neighborhood Reports.</p> <p>234. Intent of Donor.</p> <p>235. Circumstances Attending Gift.</p> <p>236. Proof of Gift from Circumstances.</p> <p>237. Value of Gift and Property of Donor—Age of Donor.</p> <p>238. Affection of Donor for Donee.</p> <p>239. Illicit Relations of Donor and Donee.</p> <p>240. Relationship of Donor and Donee.</p> <p>241. Wife to Husband.</p> <p>242. Presumption of Gift by Wife to Her Husband.</p> <p>243. Gift by Wife to Husband of the</p> | <p>Rents and Profits of her Separate Estate.</p> <p>244. Gift by Husband to Wife.</p> <p>245. Purchase of Land by Husband but Conveyance to Wife.</p> <p>246. Presumption of Gift by Husband to Wife.</p> <p>247. Parent's Gift to His Child.</p> <p>248. Gift by Parent to Child when Married.</p> <p>249. Comments Upon Presumption Arising from Delivery of Property by a Parent to His Child.</p> <p>250. Presumption Arising from Parent Advancing Money to His Child—Loan.</p> <p>251. Presumption of Gift Arising from Proof of Possession.</p> <p>252. Donee's Access to Donor's Papers and Securities—Possession.</p> <p>253. Presumption that Gift was a Payment of a Debt.</p> <p>254. Evidence of Acceptance—Presumption.</p> <p>255. Sanity of Donor.</p> <p>256. Equity will not Aid an Imperfect Gift—Specific Performance.</p> <p>257. Defendant May Show Gift Invalid.</p> <p>258. Statute of Limitations.</p> <p>259. Gift to a Class—to whom as Donee.</p> <p>260. Denying Donor's Title.</p> <p>261. Administrator or Executor not Entitled to the Possession.</p> <p>262. Validity of Gift when Creditors not Concerned—Gift Between Kin.</p> <p>263. When Title Passes.</p> <p>264. Competency of Donee as a Witness.</p> <p>265. Pleading.</p> <p>266. Question for Jury.</p> |
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215. **LEX LOCI DETERMINES VALIDITY OF GIFT.**—The validity of a gift, like a contract, is to be determined by the law of the place where it was made, without reference to the domicile of either the donor or donee. If valid at the place where made, it will be enforced in a jurisdiction in which, if it had there been made, it would have been invalid, on proof of the law of the place where made.¹

216. **BURDEN TO SHOW GIFT IS ON DONEE.**—If it is claimed that a transaction amounts to a gift, the burden is upon the donee, or the one claiming title to the property or a right thereunto, to show to the satisfaction of the court or jury that the transaction was in fact a gift. When his right to the property is challenged by the donor or his personal representatives, and title is shown to have once been in the donor, and the circumstances attending this proof does not incidentally overturn the proof of ownership in him, then the donee must, by pleading and evidence, overcome the *prima facie* title of the donor, and show a transaction which gives him title by gift.² The donee has the burden to show everything essential to the validity of the gift.³ But after the donee has made a *prima facie* case of a gift, the party denying the validity of the claim may rebut the case thus made; but, in fact, the transaction may be such as to entail upon him the burden of disproving the donee's claim all through the

¹ See Section 13; *Emory v. Clough*, 63 N. H. 552; *Dow v. Gould*, 31 Cal. 629, 652; *Whitesides v. Poole*, 9 Rich. L. 68; *Owen v. Tankersley*, 12 Tex. 405.

² *Doty v. Willson*, 47 N. Y. 580; *Alsop v. Santhold Savings Bank*, 21 N. Y. Sup. 300; *Trowbridge v. Holden*, 58 Me. 117; *Wheeler v. Glasgow*, 11 So. Rep. 758; *Perley v. Perley*, 144 Mass. 104; *Bernum v. Reed*, 136 Ill. 388; *Edwards v. Jones*, 7 Sim. 325; affirmed 1 Myl. & Craig, 226; *Vinden v. Fraser*, 28 Gr. (Can.) 502; *O'Doherty v. Ontario Bank*, 32 C. P. (Can.) 285; *Huston v. Markley*, 49 Ia. 162; *Samson v. Samson*, 67 Ia. 253; *Scott v. Reed*, 25 Atl. Rep. 604.

³ *Edwards v. Jones*, *supra*.

case. Thus in an action on a note, payable to the plaintiff and signed by the defendant, the latter gave evidence tending to show that he received the amount for which the note was given as a gift from his father, of whose estate the plaintiff was administrator, and that the note was given as a memorandum to show payment, and was to be enforced only in the event that the plaintiff was called upon to account for the amount, if needed, for the payment of debts. The plaintiff's evidence tended to show that he lent the money to the defendant out of money which had been given to the former by his father, with which to pay certain debts, retaining the remainder to his own use. It was held that the burden was upon the plaintiff throughout to show a consideration for the note.¹

217. ESSENTIALLY A MATTER OF EVIDENCE.—What constitutes a gift—what combination of circumstances will bring a case within the legal definition of a gift—is essentially a matter of evidence and not of law; and each particular case must depend upon its own circumstances, and must be such as to authorize the belief that a gift was intended. The acts of the parties must be judged by their nature and circumstances, by the usages of the community, by those innumerable considerations which no law can define; “and from all these sources conclusions should be drawn conformably to the common sense and common understandings of men.”² Abstractly speaking, “a declaration by the alleged donor of an intention

¹ *Perley v. Perley*, 144 Mass. 104. Generally that the burden is on the donee, see *Smith v. Burnet*, 35 N. J. Eq. 314, 323; *Irons v. Smallpiece*, 2 B. & A. 551; *Walter v. Hodge*, 2 Swanst. 97; *Grey v. Grey*, 47 N. Y. 552; *Dilts v. Stevenson*, 2 C. E. Gr. (17 N. J.) 407; *Johnson v. Spies*, 5 Hun, 468. When the gift is attacked by creditors of the donor for fraud, and to secure property out of which to satisfy their claims, the burden, in Arkansas, is on the donee to show that the donor's intentions were innocent, and that he had abundant means left to pay his debts: *Norton v. McNutt*, 55 Ark. 59; *Stix v. Chaytor*, 55 Ark. 116.

² *Henson v. Kinard*, 3 Strobb. Eq. 371.

to give, and a subsequent possession by the donee of the thing intended to be given, create together a strong presumption that the gift was actually made.”¹

218. WORDS OF GIFT.—No particular form of words of gift is required.² Anything that shows the donor's intention is sufficient.³ In fact, no words are necessary if the transaction is intended and so understood by the donor as a gift to the donee. The language used is always to be measured in the light of the attending circumstances and conduct of the parties. Conduct of the donee inconsistent with the after-claim of a gift is to be taken as admission against his interest. In an early case of *donatio mortis causa*, the donor said: “Now, my dear Ann, that there [viz., a bank note and a sword-blade bond], they are yours; but if I live you must give them to me again.” This was held to be a good gift.⁴ But words of mere desire, looking to the future, that the donee have the property is not enough; such as “I want you to go and collect that debt and have the benefit of it; I want the business settled up,” said by a wife to her husband on her death-bed.⁵ Where the jury found that there was a parol gift made in these words, viz., “I beg you to recollect I have given that horse to my son,” the court refused to disturb the verdict.⁶ It is not fatal to a gift *in presenti* that it is in language usually incorporated in wills if all the circumstances show an intention to make the gift effective at

¹ *McCluney v. Lockhart*, 1 Bail. L. 117.

² *Carpenter v. Butterick*, 41 Mich. 706.

³ *Kenistons v. Sceva*, 54 N. H. 24.

⁴ *Ashton v. Dawson*, 5 Colly. 264, note. Donor handed donee a bond, saying, “If I die it is yours, and then you will have something.” A good gift: *Snellgrove v. Bailey*, 3 Atk. 214; *Crum v. Thornley*, 47 Ill. 192.

⁵ *Carter v. Buckingham*, 1 Handy, 395; *Smith v. Maine*, 25 Barb. 33.

⁶ *Fowler v. Stuart*, 1 McCord L. 504. “Father, I give you all my furniture to pay all my expenses,” alluding to funeral expenses, is language for the jury from which to say whether it constituted a gift: *Flanigan v. Flanigan*, 115 Pa. St. 233.

once.¹ Where a son, who had taken care of his mother, took away a broken stove and replaced it with a new one, saying to a third person that he wanted to have a good stove there for his mother, it was held that this statement, by itself, was insufficient evidence of a gift to her.²

219. PARTICULARITY OF PROOF.—In order to support a gift something more than a mere general statement by the witness that a gift was made of the property in controversy is necessary. This is especially true of *donatio mortis causa*. Speaking of such a gift Lord Sugden said: "I should require not a mere general statement of the fact of a gift having been made, but to be informed of the most minute particulars: the amount, how it was given, where, in whose presence, and in what condition of mind and body the alleged donor was; in fact, all such particulars as might be expected in a fair transaction."³ This, however, is the old rule of practice, adopted in the English courts of chancery. Such a rule cannot be said to now prevail in this country. A person claiming title to property by gift is not now called upon, in order to sustain his claim, to show affirmatively, and with minuteness, the circumstances under which it was made.⁴ The donee may testify that the donor "gave me the" subject-matter of the gift. Such a statement cannot be treated as a conclusion. "It avers the act of giving, and would justify a finding that a gift took place, if nothing was drawn out on further ex-

¹ *Eaton v. Carruth*, 11 Neb. 231. Of course, if the donor have no title to the subject-matter of the gift, nothing passes: *Clarkson v. Stevens*, 106 U. S. 505; S. C. 29 N. J. Eq. 602; 28 N. J. Eq. 487; *Jahns v. Nolting*, 29 Cal. 507.

² *Nugent v. Foster*, 49 Mich. 434. The mere act of placing the subject-matter of the gift in the donee's hand may be sufficient, under the circumstances, to render the transaction a gift: *Essex's Est.*, 20 N. Y. Supp. 61.

³ *Thompson v. Heffernan*, 4 Sug. Dec. (Ir.) 285.

⁴ *Bedell v. Carll*, 33 N. Y. 581; *May v. May*, 36 Ill. App. 77; *Devlin v. Farmer*, 16 Daly, 98.

amination to qualify it," said the Supreme Court of Michigan.¹

220. SUFFICIENCY OF EVIDENCE.—What is sufficient proof to establish a gift depends upon the evidence in each particular case. In one case the oral evidence might be sufficient to establish the claim of the donee, while in another it would utterly fail because of the circumstances attending the transaction, regardless of the credibility of the witness. Nor have the courts been uniform in their tests of the sufficiency of the proof, especially in *donationes mortis causa*; and what was regarded sufficient in one case has failed in another. There is also a marked difference between the old² and recent³ cases on the degree of proof required; and even many of the modern cases still follow the old cases, the courts not being able to break away from the law of precedent, or unconscious of a change of views now entertained by modern practitioners, arising from a lack of investigation. It is not, however, too much to say that "the evidence must be full and satisfactory."⁴ "Undoubtedly," said the Court

¹ *Davis v. Zimmerman*, 40 Mich. 24; *Fowler v. Lockwood*, 3 Redf. 465. Almost diametrically the opposite was decided in Georgia in 1847; and these two cases well illustrate the growing tendency of the courts to relax the strict rules one time applied to gifts. In the Georgia case a witness testified "that she saw a gift made by" the donor to the donee. This was held to be inadmissible, because it was testimony of no act or fact from which the court or jury could draw the conclusion that a gift was made, it being only the opinion of the witness: *Carter v. Buchanon*, 3 Geo. 513. See, also, *Smith v. Burnet*, 8 Stew. (N. J.) Eq. 314, affirming 7 Ib. 219. Pleading, see Section 264.

² *Raymond v. Sellick*, 10 Conn. 480, 485.

³ *Love v. Francis*, 63 Mich. 181.

⁴ *Shirley v. Whitehead*, 1 Ired. Eq. 130; *Barnum v. Reed*, 136 Ill. 388; *Parker v. Hinson*, 1 Ired. Eq. 381; *Devlin v. Greenswick Savings Bank*, 125 N. Y. 756. In a *donatio mortis causa* in an early English case, the court said: "In a case of this sort, the court always expects the most clear and satisfactory evidence; and a mere delivery by a husband to his wife is far from being conclusive, the possession of the wife being in general the possession of the husband." *Walter v. Hodge*, 1 Wils. Ch. 445. "We agree with the learned judge, that clear and sat-

of Appeals of New York, "in such cases [*donationes mortis causa*] the proof must be clear and convincing, and strong and satisfactory, but it is not correct to say that the presumptions of law are *against* a gift as the learned judge charged, although it is true that the law does not presume in its favor, but requires clear and convincing proof; nor was it proper to say to the jury that the fact of a gift must be proved beyond suspicion."¹ In an Indiana case it was said: "Expressions are sometimes

isfactory evidence of the gift and of the deliverance in pursuance of it, would be enough without the superlative adjective [most] insisted on by counsel:" *Cummings v. Meaks*, 2 Pitts. 490; S. C. 11 Pitts. L. Jr. 291. If the transaction points equally to a gift or loan, the transaction will be regarded as a loan rather than a gift, even as between father and child: *Slaughter v. Tutt*, 12 Leigh, 147; *Dunne v. Boyd*, 8 Ir. Eq. 609 (1874). "And I shall always require strong evidence, more especially in the case of a clergyman [as donee], before I support a gift made *in extremis*:" Lord Sugden in *Thompson v. Heffernan*, 4 Sug. Dec. (Ir.) 285. "Gifts made in prospect of death are not favored or encouraged by the courts; but when the proof establishes a valid gift of that nature, it is to be upheld:" *Bedell v. Carll*, 33 N. Y. 581; *Hatch v. Atkinson*, 56 Me. 324. "When property is obtained by way of alleged gifts from individuals who suppose themselves about to die, it is the duty of a court of justice to watch the evidence of the transaction most narrowly:" *Staniland v. Willott*, 3 MacN. & G. 664, 670. "A son claiming property as a gift from his father, or any other person claiming it as a gift, ought to be held to make reasonably strict proof of the gift:" *Boudreau v. Boudreau*, 45 Ill. 480; *Richer v. Voyer*, 5 Rev. Leg. 591. In an action to recover damages for the killing of a cow, evidence that the cow was given to the plaintiff by a third person, coupled with a request that at a future time the plaintiff give another cow to the plaintiff's son, is sufficient evidence of ownership to support a judgment: *Wood v. St. Louis, etc., R. W. Co.*, 20 Mo. App. 601. "It is laid down in all the cases where judges have commented on the evidence necessary to support a *donatio mortis causa*, that it must be established by *clear* evidence. The proof must be more than is required merely to turn the scale in favor of one or two equally probable conclusions. It must establish to the satisfaction of the court that the claimant's case is not only probable, but reasonably free from doubt?" *M'Gonnell v. Murray*, 3 Irish Eq. 460 (1869).

¹ *Lewis v. Merriitt*, 113 N. Y. 386, reversing 42 Hun, 161, explaining *Grey v. Grey*, 47 N. Y. 552, and quoting from *Grymes v. Hone*, 49 N. Y. 17, that "As there is great danger of fraud in this sort of gift, courts cannot be too cautious in requiring clear proof of the transaction:" *Devlin v. Greenwich Savings Bank*, 125 N. Y. 756. The rule "beyond suspicion" as between husband and wife was adopted in New Jersey: *Dilts v. Stevenson*, 17 N. J. Eq. 407; *Schick v. Grote*, 42 N. J. Eq. 352.

found in the books to the effect that gifts *causa mortis* are not favored in law, because of the opportunity which they afford for the perpetration of frauds upon the estates of deceased persons by means of perjury and false swearing; but gifts of the character of that in question are not to be held contrary to public policy, nor do they rest under the disfavor of the law when the facts are clearly and satisfactorily shown which make it appear that they were freely and intelligently made."¹

221. NUMBER OF WITNESSES.—There is no rule, unless fixed by statute, requiring the testimony of a certain number of witnesses to establish a gift. By the civil law five witnesses to establish a *donatio mortis causa* were required. But with us the testimony of a single witness is sufficient, if free from doubt or suspicion and clearly showing a transaction amounting to a gift. Even the evidence of the claimant alone, when he is not disqualified, is sufficient to establish the gift.² A statute requir-

¹ *Devol v. Dye*, 123 Ind. 321; *Ellis v. Secor*, 31 Mich. 185. Where a father had expressed his intention to give his son the note of a third person he held, and shortly before his death, and in anticipation of it, delivered certain notes to his wife for her use, and then handed to his son several papers, among them the note, including his will, saying: "If I get well bring them back; if I die, keep them;" or "they are yours," as one witness said; it was held that there was not a gift of the note, for the reason of the fact that it was clear that the testator never intended to make a gift of all the papers, and the note must be placed in the same position that they occupied: *Blain v. Terryberry*, 9 Gr. Ch. 286. Where the donor, when sick, gave the alleged donee a handkerchief containing an article, saying: "Take care of it;" and the donee laid it on a chair, at which the donor became angry, and she then took it and put it in a book-case, locked it up, and put the key, which was one of a bunch belonging to the donor, into her pocket, and after his death an unsigned letter was found in the handkerchief, giving the contents to her; it was held that there was no gift; for there was nothing to show an intent to give except the letter, which could not be considered for lack of a delivery: *Wildish v. Fowler*, 6 T. L. R. 422, reversing 5 T. L. R. 113.

² *McGonnell v. Murray*, 3 Irish Eq. 460 (1869); *Walsh v. Studdart*, 4 Dr. & War. 159; S. C. 6 Irish Eq. 161 (a single witness); *Gosnahan v. Grice*, 15 Moo. P. C. 223; *Thomas v. Lewis*, 15 S. E. Rep. 389.

ing two witnesses to prove the delivery in a gift *mortis causa* does not require two witnesses to prove the gift itself. That fact may be shown by only one, or by acts and circumstances.¹

222. PRIOR DECLARATIONS OF DONOR.—Declarations made by a donor before the gift is made, showing an intent to make it, are admissible for the donee; and the length of time elapsing between their utterance and the alleged time of the gift is a matter for the consideration of the jury in determining what weight shall be given them. Declarations made long anterior, accompanied by other declarations from thence down to the time of the gift, are often of a very convincing character, as showing the intent of the donor to make the gift as claimed; and may tend to explain ambiguous language used at the time the gift is made.² These declarations of an intent must be followed up with proof of a delivery, either actual or constructive, or of declarations made afterward to the effect that the gift had been made.³ Proof of declarations connected with other gifts are usually not admissible, unless in some way connected with the one in question.⁴ If the proof of a prior declaration offered merely shows an intent or a promise to give, and it is not proposed to follow it up with corroborating circumstances of a gift, it may be excluded; for it is of itself insufficient to establish the gift.⁵ So prior declarations of the donor in his favor are admissible if they tend to show a continuous and apparently fixed state of mind and purpose in him, incon-

¹ Kenistons v. Sceva, 54 N. H. 24.

² Smith v. Maine, 25 Barb. 33; Hunter v. Hunter, 19 Barb. 631.

³ Larimore v. Wells, 29 Ohio St. 13.

⁴ Scott v. Berkshire County Savings Bank, 140 Mass. 157. See Section 232.

⁵ Rockwood v. Wiggin, 16 Gray, 402; Coleman v. Parker, 114 Mass. 30, explained in Pritchard v. Pritchard, 69 Wis. 373; Yancey v. Stone, 7 Rich. Eq. 16.

sistent with the alleged gift, to contradict the testimony of the donee.¹ Such declarations need not have been made in the donee's presence.²

223. DECLARATIONS AT TIME OF GIFT.—The language of both the donor and the donee used at the time the alleged gift is made is admissible as a part of the *res gestæ*. It enters into and becomes a part of the transaction, and is usually the most potent factor in determining the claim that there was a gift. The force and effect of the language used is to be determined by the jury. Such language, as a rule, indicates the intent of the parties, though it is not conclusive; for the acts and conduct of the parties, taken in connection with the language, may indicate an intent on their part contrary to that at first blush indicated by the language alone. Be that as it may, however, it does not lessen the right of both the donor and donee, not only to introduce what they both said, but even what was said by any bystanders, with reference to the gift, made in their joint presence.³ What declarations are a part of the *res gestæ* of a gift must depend upon each particular

¹ *Whitney v. Wheeler*, 116 Mass. 490; *Sherman v. Sherman*, 75 Ia. 136.

² *Whitwell v. Winslow*, 132 Mass. 307; *Banks v. Hatton*, 1 Nott & McC. 221; *Sourwine v. Claypool*, 138 Pa. St. 126; *Miller v. Clark*, 40 Fed. Rep. 15.

³ *Duling v. Johnson*, 32 Ind. 155; *Woolery v. Woolery*, 29 Ind. 249; *Hackney v. Vrooman*, 62 Barb. 650; *Ashton v. Dawson*, 2 Colly. 364 n.; *Fellows v. Smith*, 130 Mass. 378; *Whitney v. Wheeler*, 116 Mass. 490; *Evans v. Lipscomb*, 31 Ga. 71. Of course, the declarations of the donor that he made the gift are admissible against his personal representative in a contest between them and the donee: *Hackney v. Vrooman*, 62 Barb. 650. Generally, *Lister v. Sisters*, 35 N. J. Eq. 40; *Whitfield v. Whitfield*, 40 Miss. 352; *Richards v. Munro*, 30 S. C. 284. Stub of a note: *Cowee v. Cornell*, 75 N. Y. 91; S. C. 31 Am. Rep. 428; *Johnson v. Spies*, 5 Hun, 468; *Higgins v. Johnson*, 20 Tex. 389; *Johnson v. Burford*, 39 Tex. 242; *Smith v. Strahan*, 25 Tex. 103; *Barziza v. Graves*, 25 Tex. 322; *Watson v. Kennedy*, 3 Strob. Eq. 1; *Lark v. Cunningham*, 7 Rich. L. 57. The declarations need not have been made to the donee nor in his presence: *Olds v. Powell*, 7 Ala. 652; *Whitwell v. Winslow*, 132 Mass. 307; *Powell v. Olds*, 9 Ala. 861; *Banks v. Hatton*, 1 Nott & McC. 221; *Duff v. Leary*, 146 Mass. 533; *Rector v. Danley*, 14 Ark. 304.

transaction claimed as a gift. "The idea of the *res gestæ*," said the Supreme Court of Georgia, "presupposes a *main fact*, or principal transaction; for example, the delivery into possession of a slave might be the main fact in an alleged gift. . . . The *res gestæ* mean the circumstances, facts, and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character. . . . One particularity of the main fact or transaction ought to be noted, and that is this, that it is not necessarily limited as to time; it may be length of time in the action. The time, of course, depends upon the character of the transaction; it is, however, well settled that the acts of the party, or the facts or circumstances or declarations which are sought to be admitted in evidence, are not admissible unless they grow out of the principal transaction, illustrate its character, and are contemporary with it." Consequently, declarations of the donor in the evening of the day of the gift, but after it had been made, were held inadmissible as a part of the *res gestæ*.¹

224. DECLARATIONS MADE SUBSEQUENT TO THE TIME OF THE ALLEGED GIFT.—Declarations made by the donor after the time of the alleged gift in favor of the donee or tending to admit that a donation was made of the subject-matter of the gift to the donee are admissible on behalf of the donee and those claiming under him, to establish the fact of the gift; but such declarations are not admissible on behalf of the donor, to disprove the gift, on the ground that he cannot defeat a title he has once given, although other declarations, admitting the gift, are in evidence for the donee.² Thus where a wife claimed, after her husband's

¹ Carter v. Buchannon, 3 Geo. 513; Evans v. Lipscomb, 31 Geo. 71, 108.

² Porter v. Allen, 54 Geo. 623; Poullain v. Poullain, 76 Geo. 420; Blalock v. Miland, 87 Geo. 573; Kimball v. Leland, 110 Mass. 325; Scott v. Berkshire County Savings Bank, 140 Mass. 157; Hatch v. Straight, 3 Conn. 31; Durham v. Shan-

death, certain property as her own separate estate, and proved that he on several occasions after the marriage declared the property to be hers, his declarations made out of her presence that the property was his own was held inadmissible, although she contended that he "always during his lifetime regarded and treated it as her separate property."¹ But if there is a dispute as to the time of the gift, and especially if the transaction is of an ambiguous character, such evidence may be admissible, according to the character of such particular transaction.² If the donor retain possession of the gift, and the time at which it was made is uncertain and the fact of gift is in dispute, declarations of the donor while thus in the manual possession of the gift, claiming to be the owner, are admissible for him, in contradiction of those adduced by the donee admitting the gift.³ So it may be stated generally that after-declarations of the donor are admissible in his favor where they tend to explain his statements previously given in evidence by the donee; or if they are assertions not in disparagement of the donee's title, but tending to show an incapacity of mind in the donor, and spoken in a reasonably short time after the gift.⁴ The donee may also show that after the

non, 116 Ind. 403; *Burney v. Ball*, 24 Geo. 505; *Howell v. Howell*, 59 Geo. 145; *Woodruff v. Cook*, 25 Barb. 505; *Smith v. Maine*, 25 Barb. 33; *Ivatt v. Finch*, 1 Taunt. 141; *Smith v. Smith*, 3 Bing. N. C. 29; *Lister v. Lister*, 35 N. J. Eq. 49; *Bennett v. Cook*, 28 S. C. 353; *Pritchard v. Pritchard*, 69 Wis. 373; *Griffin v. Stadler*, 35 Tex. 695; *Crawford v. McElvy*, 2 Sp. (S. C.) 225. In a controversy between the donor and the donee concerning the title to the subject-matter of the gift, conversations between the donor and a third person, who is referred by the donee to him as the owner, is not admissible in his favor: *Beecher v. Mayall*, 16 Gray, 376; *Walden v. Purvis*, 73 Cal. 518 (inadmissible even to prove fraud). Statements made by a deceased donor after the time of the gift and set forth in the pleadings of another controversy are not admissible: *Love v. Francis*, 63 Mich. 181.

¹ *Baxter v. Knowles*, 12 Allen, 114.

² See Section 146; see *Scott v. Berkshire Savings Bank*, 140 Mass. 157.

³ *Hansell v. Bryan*, 19 Geo. 167; *Bennett v. Cook*, 28 S. C. 353.

⁴ *Howell v. Howell*, 59 Geo. 145.

gift was made, as alleged, the donor did not include the subject-matter of the gift in his assessment list for taxation.¹ But if the donee introduce subsequent declarations of the donor in favor of the gift, the donor, in order to rebut the presumption thus raised, may also, it has been held in one case, show his own declarations claiming the ownership of the subject-matter of the gift; and the record of a suit, abated because of his death, may be introduced by his personal representative, where, in an action of tort for a conversion of the property, he had pleaded not guilty.² A different rule, however, was afterward adopted in the same State where the proof clearly showed a gift, and such declarations were rejected. It was said that the rule adopted in *Sims v. Saunders* was where the evidence did not conclusively establish a gift, and was made to depend upon the degree of clearness and weight of the evidence in favor of the gift. Its soundness was doubted.³ In a more recent case it was held that the subsequent declarations of the donor may be given in evidence to rebut his declarations brought forward by the donee, but such counter-declarations must not have been made *post-litem motam*.⁴ To render the admission of subsequent declarations erroneous it must be clearly shown that they were uttered at a time posterior to the time of the gift, especially where the time of the transaction is not clear.⁵

225. SUBSEQUENT DECLARATIONS WHEN TRANSACTION IS DOUBTFUL OR DONEE IN POSSESSION.—When the circumstances are equivocal and it is doubtful whether the donor intended a gift or a loan, explicit declaration of

¹ *Whitfield v. Whitfield*, 40 Miss. 352.

² *Sims v. Saunders*, Harp. (S. C.) 374.

³ *Snowden v. Pope*, Rice Eq. (S. C.) 174; *McKane v. Bonner*, 1 Bail. L. (S. C.) 113. Same rule adopted in Arkansas: *Ryburn v. Pryor*, 14 Ark. 505.

⁴ *Stone v. Stroud*, 6 Rich. L. 306.

⁵ *Gillespie v. Burleson*, 28 Ala. 551.

intention made after the transaction has taken place is admissible for the purpose of removing the ambiguity.¹ Thus where a donor deposited money in a savings bank in the name of the donee without his knowledge, and retained possession of the pass-book until he died, letters between the bank and the donor with reference to the deposit, and his declarations relating to the deposit while holding the book were admitted, to show the character of the act.² So any declarations of the donor while in possession of the subject-matter of the gift is admissible in evidence as part of the *res gestæ*, to prove the character of his possession.³

226. DECLARATIONS OF DRUNKEN DONOR ATTEMPTING TO REGAIN POSSESSION WHEN SOBER.—The declarations of a drunken donor against his interest is admissible in evidence, and their weight is a question for the jury; and the donor, if the property is sought to be subjected to the donee's debts, may prove his subsequent acts and declarations when he became sober, if promptly made and persisted in, to show, with other circumstances, his mental condition.⁴

227. INOPERATIVE DEED TO SHOW DECLARATIONS OF A GIFT.—Though a deed of gift is inoperative for the lack of an acknowledgment or registration, and for that purpose insufficient to give title to the donee; yet it is admissible as a declaration of gift, like any parol declaration.⁵ If a delivery is shown, such deed may be deemed sufficient proof of a gift.⁶

¹ Doty v. Willson, 47 N. Y. 580; Minchin v. Merrill, 2 Edw. Ch. 333.

² Scott v. Berkshire County Savings Bank, 140 Mass. 157; Bennett v. Cook, 28 S. C. 353; Stallings v. Finch, 25 Ala. 518.

³ Nelson v. Iverson, 19 Ala. 95; S. C. 17 Ala. 216; Stallings v. Finch, 25 Ala. 518.

⁴ Blagg v. Hunter, 15 Ark. 246; Morisey v. Bunting, 1 Dev. L. 3.

⁵ Myers v. Peek, 2 Ala. 648; Sewall v. Glidden, 1 Ala. 52.

⁶ Sewall v. Glidden, 1 Ala. 52.

228. REFERENCE IN WILL TO GIFT.—A reference in his will to the gift, executed at the time the donor made the gift, is relevant testimony, tending to show the gift, and is admissible as a part of the *res gestæ*. It is not, however, sufficient alone to give title to the donee.¹ A gift may be confirmed by the will of the donor, and a devise of the article formerly given is such a confirmation.² So where a will was executed after the time of the gift of a slave, giving the donee only a life estate in the slave, such will and the sworn petition of the donee to probate it was held admissible to rebut the testimony of the oral declarations of the donor.³ But the fact that the father had made a will does not prevent his son (his donee) from showing a parol gift inconsistent with the provisions of the will.⁴

229. DECLARATIONS OF DONEE.—The declarations of a donee in possession concerning the ownership of the gift is admissible as a part of the *res gestæ* to show the character of his possession, whether the controversy is between the donor and donee, or between some one claiming under the donor and donee when the donee is disclaiming any interest in the gift.⁵

230. DECLARATIONS TO PROVE A DELIVERY.—Declarations of the donor made prior to the time of the alleged gift, especially if frequently repeated, showing a clear intention to give, followed, after that time, by declarations that he had given, are sufficient evidence of an actual

¹ Jennings v. Blocker, 25 Ala. 415; Anderson v. Dunn, 19 Ark. 650.

² Decker v. Waterman, 67 Barb. 460.

³ Barziza v. Graves, 25 Tex. 322.

⁴ Richards v. Munro, 30 S. C. 284.

⁵ Degraffenreid v. Thomas, 14 Ala. 681; McBride v. Thompson, 8 Ala. 650; Thomas v. Degraffenreid, 17 Ala. 602. But the declarations of a mere agent in control are not admissible: Degraffenreid v. Thomas, 14 Ala. 681; Crane v. Allen, 11 La. Ann. 493; Durham v. Shannon, 116 Ind. 403.

delivery if the declarations were not loose and playful ; and this is especially true where the donor is under a moral obligation to give. Nor is the force of such declarations weakened by the fact that the donor remained in possession if such possession be accounted for or explained ; such as proof of an agreement with the donee, on the part of the donor, to hire the subject-matter of the gift.¹ In a Pennsylvania nisi prius case it was said : "The delivery may be proved by the declaration of the donor just as the gift itself may be ; and when the donor declares that he *had given* at a previous time, and that the donee had then become the owner, it is implied that delivery, and indeed every other formality necessary to create a complete gift, had taken place. The law always presumes knowledge of its requirements."²

231. DECLARATIONS INSUFFICIENT TO ESTABLISH GIFT. —Bare declarations are not sufficient to make a gift ; and, therefore, the person on whom the burden devolves to establish a gift must prove something more than the declarations of the donor that a gift has been made ; he must show some act from which the jury may presume a delivery. Therefore a statement of a witness that the donor said he had given the subject-matter of the gift, naming

¹ Blake v. Jones, Bail. Eq. (S. C.) 141. In this case the court observed : "As it is said in repeated adjudications, *Brashears v. Blasingame*, 1 N. & M. 223, and *Reid v. Colcock*, Ib. 592. when a party says he has given, he may be fairly presumed to have observed the requisite ceremonies : " Language indorsed in *Bennett v. Cook*, 28 S. C. 353, 3 3 ; *Yancey v. Field*, 85 Va. 756.

² *Malone's Estate*, 37 Leg. Int. 63 ; affirmed, 38 Leg. Int. 303 ; *Harris v. Hopkins*, 43 Mich. 272. In the Pennsylvania case the husband, the donor, had regained possession of the gift. In Wisconsin it is said that "such evidence by all authority is weak and unsatisfactory without corroboration : " *Pritchard v. Pritchard*, 69 Wis. 373. In *Barziza v. Graves*, 25 Tex. 322, it is said that where it is attempted to prove a gift from a husband to a wife by declarations alone, every admissible evidence, though ever so slight, which tends to counteract the evidence of the husband's admissions should be admitted.

it, to the donee, and he had no right to sell it, is insufficient alone to establish the gift.¹ But the donor's admission that he had delivered the property is competent evidence upon the question of its delivery.² But it has also been said that, without corroboration, proof of a gift by mere declarations is quite weak and unsatisfactory.³ In the case of a *donatio mortis causa* a conversation with the deceased which may be regarded as a narrative by him of what he had done on a former occasion is not sufficient to establish the gift as a *mortis causa*.⁴ Admissions of the donor, however, that the gift had been made may be sufficient proof to establish it.⁵

232. DECLARATIONS AS TO OTHER GIFTS.—Declarations of the donor as to his intent to make other gifts than the one in controversy is, as a general rule, inadmissible.⁶

233. NEIGHBORHOOD REPORTS.—Reports current in the neighborhood that the donor had made the gift to the donee, or reports that when he made it he was drunk and that he disowned it when sober, is not admissible in evidence in an action between the donor and donee, or any one claiming under the latter.⁷

¹ *Anderson v. Baker*, 1 Geo. 595. See *Carter v. Buchannon*, 3 Geo. 513; *Evans v. Lipscomb*, 31 Geo. 71, 109; *Burney v. Ball*, 24 Geo. 505; *Hunter v. Hunter*, 19 Barb. 631; *Smith v. Burnet*, 35 N. J. Eq. 314, 323; *Backer v. Meyer*, 43 Fed. Rep. 702; *Tomlinson v. Ellison*, 104 Mo. 105.

² *Kenistons v. Sceva*, 52 N. H. 24.

³ *Pritchard v. Pritchard*, 69 Wis. 373. See *Barziza v. Graves*, 25 Tex. 322; *Barnum v. Reed*, 136 Ill. 388 (not sufficient).

⁴ *Hebb v. Hebb*, 5 Gill (Md.), 506.

⁵ See Section 230; *Harris v. Hopkins*, 43 Mich. 272. But such an admission made by the donor while in possession of the gift, accompanied by an explanation that he had hired it of the donee, is not sufficient evidence of a gift: *Bryant v. Ingraham*, 16 Ala. 116.

⁶ *Olds v. Powell*, 7 Ala. 652; *Porter v. Allen*, 54 Geo. 623. See Section 222.

⁷ *Blagg v. Hunter*, 15 Ark. 246.

234. INTENT OF THE DONOR.—The intention of the donor to give is always a subject of investigation. The validity of every gift depends upon the donor's intention to give; and that intent must be gathered from his language and conduct and the circumstances attending the transaction. For without an intent to give the entire transaction cannot be taken as a gift, and the claim of the donee must fail, regardless of the understanding he had or the extent to which he was misled, unless the element of an estoppel intervene.¹ Anything that would repel such an intention is also admissible in evidence.² Of course, any evidence showing that the donor did not then consider the gift completed, but did consider some further act on his part as necessary is also admissible, as tending to show that he had not yet yielded complete control over the subject-matter of the gift. But a request by the donor of a *mortis causa* that the subject-matter of the gift should not be disposed of until after his death, for he did not know what might happen, or that he might need it, is simply a statement of the law applicable to such a gift and does not show an intention on the part of the donor to perform some further act in order to complete the gift.³

235. CIRCUMSTANCES ATTENDING GIFT.—Proof of the circumstances attending the alleged gift is always of value and admissible both for and against the claim that a gift was actually made. The circumstances lend and give color

¹Stevens v. Stevens, 2 Redf. 265; Smith v. Burnet, 35 N. J. Eq. 314, 324; Hitch v. Davis, 3 Md. Ch. 266; Gray v. Barton, 55 N. Y. 68; Fowler v. Stuart, 1 M'Cord L. 504; McGonnell v. Murray, L. R. 3 Eq. (Ir.) 460.

²Smith v. Maine, 25 Barb. 33. Unsigned orders, though ineffectual if they had been signed, may be given in evidence to show the donor's intention: Dunne v. Boyd, 8 Ir. Eq. 609 (1874). In a *donatio mortis causa* it is said that the intent must be clearly shown: Hatch v. Atkinson, 56 Me. 324.

³Grymes v. Hone, 49 N. Y. 17, 20.

to the transaction, without which it would be difficult to definitely understand the language used by or the acts of the parties. They explain, often, the language of the parties, and give a significance to the language they used which otherwise would be meaningless or ambiguous.¹

236. PROOF OF GIFT FROM CIRCUMSTANCES.—Language of donation need not necessarily be used in order to make a gift effectual. A valid gift may be shown by the acts and conduct of the parties. Such is strikingly the case, as we have seen,² where a parent in the Southern States sent a slave to the home of his recently-married child, and there permitted it to remain; or where a parent now sends household furniture, or articles suitable for and needed by his recently-married child, to its home, and acquiesces in such child's retention of the gift.³ Many instances arise in the ordinary life where the acts of the donor and donee with reference to the subject-matter of the gift show as clear intent on the part of the donor to give and on the part of the donee to accept as if that intent had been expressed in language.⁴ Thus where a wife, a tenant for life of her husband's estate, satisfied of record a mortgage thereon, and for sixteen years, until her death, made no sign that she regarded herself as a creditor of the estate, it was held that the transaction amounted to a gift to the remaindermen, who were her children.⁵ It occasionally happens in *donationes mortis causa* that the final act of giving is evidenced only by the acts or conduct of the donor. Thus where it was clear that a father fully intended to make a gift of his daughter's obligation to her

¹ *Henson v. Kinard*, 3 Strob. Eq. 371; *Poullain v. Poullain*, 79 Geo. 11.

² See Section 13.

³ *Falconer v. Holland*, 5 S. & M. 689.

⁴ *Carter v. Judge*, 2 S. & M. 42.

⁵ *Estate of Wandel*, 16 Phila. 230; S. C. 40 Leg. Int. 131; *Toplis v. Heyde*, 4 Y. & C. 173.

as evidenced by his repeated prior declarations, and, when so near his death that he could hardly utter a word, visibly manifested his satisfaction at the delivery to her, in his presence by a third person, of the obligation, and pressed the hands of his daughter while she held the papers, the gift was upheld.¹

237. VALUE OF GIFT AND PROPERTY OF DONOR—AGE OF DONOR.—The value of the gift and the ability of the donor to make it, and the amount of property in his possession after the gift is made, especially taking into consideration his age of life, are always questions for the consideration of the jury. A man is not likely to strip himself of all his property and leave himself without support; neither is a man in early life as likely to divest himself of the greater part of his property as a man of advanced age who can have but few years, in all likelihood, to live. It is no uncommon occurrence that an aged man who expects to live only a few years will make a gift of the greater part of his property to an object of his affections, reserving what he considers a safe and suitable provision for himself for the years he expects to survive, while a man in early life would not thus strip himself of property, deprive himself of the power that wealth brings, and render himself liable to come to want or poverty before he had lived out his expected length of years. These are all matters for consideration when the validity

¹ *Duffield v. Hicks*, 1 Dow & C. 1; S. C. 1 Bligh, N. S. 497. But see *Blain v. Terryberry*, 9 Gr. Ch. 286. "The situation, relation, and circumstances of the parties, and of the subject of the gift may be taken into consideration in determining the intent to give and the fact as to delivery:" *Cooper v. Burr*, 45 Barb. 33, quoted in *Kurtz v. Smithers*, 1 Dem. 399.

A father purchased a land certificate and paid for it in part with his children's money and in part with his own, and had a conveyance made to them. This was held to show a gift to them of the money of his own that he had paid: *Burk v. Turner*, 79 Tex. 276. See *Rinker v. Rinker*, 20 Ind. 185.

of a gift is involved. Thus where a father in early life gave his infant son nearly all his property, leaving scarcely anything for his own support or that of his wife or of the children he might thereafter have, the court said that the proofs to support the allegation of such a gift must be stringent to be entitled to full confidence.¹ If the gift is trifling in value, then neither the age nor property of the alleged donor is of any weight, especially if he is a man of some property.²

238. AFFECTION OF DONOR FOR DONEE.—A gift is always a bounty, a free-will offering from the donor to the donee, and the latter is always the object of the former's generosity. Generosity springs from an affection of the heart, and it seldom prompts man to make a gift to a person who is not affectionately regarded by the donor. The love of the donor for the donee may extend over a long period or be of even momentary duration; and the probability of an intent to make a gift may or may not be as strong in the one instance as in the other, being usually measured according to its intensity. These circumstances are, however, questions for the jury to weigh after the facts to show them have been detailed by the witnesses. It is, therefore, always competent to show how the donor regarded the donee, and the affection he bore for him.³ So it may be shown that the donor was under a moral obligation to the donee, to reward him for love and attention bestowed by the latter on the former.⁴

¹ *Parker v. Hinson*, 1 Ired. Eq. 381; *Meach v. Meach*, 24 Vt. 591; *Ross's Appeal*, 127 Pa. St. 4.

² Where a gift of bills was claimed as a *donatio mortis causa*, it was considered as a suspicious circumstance that their amount was not disclosed: *Walter v. Hodge*, 1 Wils. Ch. 445.

³ *Henson v. Kinard*, 3 Strob. Eq. 371; *Duffield v. Hicks*, 1 Dow. & C. 1; S. C. 1 Bligh, N. S. 497.

⁴ *Smith v. Maine*, 25 Barb. 33.

239. **ILLICIT RELATIONS OF DONOR AND DONEE.**—If the donor and donee have had illicit relations, or have lived together as husband and wife, that is always a matter for consideration, and usually is a factor of weight against the donee, especially where the establishment of the gift rests mainly on her testimony. Donors are usually not as liberal to their paramours, as the latter would have us believe after the former are dead. Such gifts are regarded with suspicion.¹

240. **RELATIONSHIP OF DONOR AND DONEE.**—It may always be shown what relationship the donor and donee bore to each other; for a person is more apt to make a relative, especially of his own blood, the object of his bounty than a mere stranger. Such proof shows a motive for the gift, and often a very strong one when the donee has a moral right to expect aid from the donor.²

241. **WIFE TO HUSBAND.**—There is nothing to prevent a wife making a gift of her separate personal estate to her husband, but such a gift is never presumed. To support it the evidence must be clear and unequivocal, and her intention free of doubt.³ Much stress, however, has been laid upon these kind of gifts in the language used with reference to them, pointing out the danger of fraud or undue influence of the husband, and the necessity of adopting a stringent rule to avoid imposition upon her. If it clearly appears that she intended to make the gift, and that she was not coerced or overpersuaded by her husband or his agents, then the gift should be upheld

¹ *Shirley v. Whitehead*, 1 Ired. Eq. 130. The illicit relations may, however, afford the reason why the donor made the gift.

² *Estate of Wandel*, 16 Phila. 230; S. C. 40 Leg. Int. 131; *Smith v. Maine*, 25 Barb. 33; *Capek v. Kropik*, 129 Ill. 509; *Rhodes v. Child*, 64 Pa. St. 18.

³ *Brooks v. Fowler*, 82 Geo. 329; *Conner v. Root*, 11 Colo. 183.

with as much reason as her gift to her child or other person having a moral claim on her bounty.¹

242. PRESUMPTION OF GIFT BY WIFE TO HER HUSBAND.—There is no presumption that a wife has made a present of her separate property, or any part of it, to her husband; nor of property she inherits and which does not come to her stamped as her separate estate. Under the common law, of course, the wife's personal property becomes his if he reduced it to possession, and while the presumption may or may not be that he did reduce it to his possession; yet that presumption, whichever way it may tend, in no way relieves him from the burden of showing a gift of the property by her to him when he claims it as a gift.²

243. GIFT BY WIFE TO HUSBAND OF THE RENTS OR PROFITS OF HER SEPARATE ESTATE.—If a married woman living with her husband permits him, without objection, to receive the income of her separate estate, or to appropriate any annual payments, such as pin money directed to be paid to her, these payments are deemed to have been made to or appropriated by him with her consent, and she cannot call him to an account concerning them. And if he appropriate them even for his entire life, she cannot maintain an action against his estate. In such instances

¹ *Cain v. Ligon*, 71 Geo. 692; *Sasser v. Sasser*, 73 Geo. 275. If she give her property to a person not her husband, the latter's ill treatment of her may be shown as a motive and reason for making the gift when he attacks its validity: *Conner v. Root*, 11 Colo. 183. But where the husband was sick, and he and his wife agreed to divide their furniture and separate, and his father took him and his furniture to his house, where he died in a few days, and the father claimed this furniture as a gift from his son, it was held that it was irrelevant to show the happy relations that had existed between the husband and wife: *Flanigan v. Flanigan*, 115 Pa. St. 233.

² *Vinden v. Fraser*, 28 Gr. Ch. 502. See *O'Doherty v. Ontario Bank*, 32 C. P. (Can.) 285.

the presumption is that he took them with her consent and by way of gift.¹ The same rule prevails if she expressly authorize him to receive the income, without saying what he shall do with it.² Of course, the wife, or those claiming through her, may show that the income was not a gift; but she has the burden to prove such a claim. It is immaterial how he uses this income, whether for the support of the family, in the repair of her separate estate, or for his own separate benefit; the same rule of presumption of a gift to him, under such circumstances, prevails.³

244. GIFT BY HUSBAND TO WIFE.—The motive of a husband to make a gift to his wife is very strong. Their relationship is the most intimate in the world. She usually is dependent on him for her daily bread and necessities of life, and to him she must usually look for her support during widowhood, if she survive him. Love for no other mortal appeals to him more strongly as an object of his bounty and generosity; and upon no other can he bestow a gift with so little pecuniary loss to himself; for whatever supplies her wants lessens the obligations resting upon him to provide for them. But this intimate relationship and daily contact is one to be carefully considered in determining the weight of language used by the

¹ *Smith v. Camelford*, 2 Ves. Jr. 698; *Powell v. Hankey*, 2 P. Wms. 82; *Squire v. Dean*, 4 Bro. C. C. 326.

² *Milnes v. Rusk*, 2 Ves. Jr. 488; *Methodist Episcopal Church v. Jacques*, 3 Johns. Ch. 77; *Beresford v. Archbishop of Armagh*, 13 Sims. 643; *Thrupp v. Harman*, 3 My. & K. 513; *Charles v. Coker*, 2 S. C. 122; *Reeder v. Flinn*, 6 S. C. 216; *Jaques v. Methodist Episcopal Church*, 17 Johns. 549; S. C. 8 Am. Dec. 447; *Bradish v. Gibbs*, 3 Johns. 523; *Albany Fire Ins. Co. v. Bay*, 4 N. Y. 9; *Ritch v. Hyatt*, 3 McArthur, 536; *Lyon v. Green Bay, etc., R. Co.*, 42 Wis. 528; *McClure v. Lancaster*, 24 S. C. 273; *Yale v. Dederer*, 22 N. Y. 450; *Gardner v. Gardner*, 1 Giff. 126; *Kelley v. Dawson*, 2 Moll. 87; *Payne v. Little*, 26 Beav. 1; *Buckeridge v. Glassie*, Cr. & P. 126; *Bartlett v. Gillard*, 3 Russ. 149; *Dalbiac v. Dalbiac*, 16 Ves. 116.

³ *Reeder v. Flinn*, 6 S. C. 216.

husband, purporting to make a gift to her. Words which used toward a stranger would be of weight, when used toward the wife in the household circle will carry little conviction of an intent to part with property. In a Mississippi case it was said that "The property of husbands and wives would be held by a frail tenure, indeed, if casual remarks, such as those referred to by the witness, dropped in the course of conversations in the intimacy of the family circle, should be held to be sufficient evidence of transfer of estate."¹ Where a woman was married in England and came to this country, bringing with her some money she had before the marriage and some more she acquired after that event by her own labor, it was decided that this money was the husband's by his marital rights; and that although they both supposed the money belonged to her, a presumption of a gift or transfer did not arise from his acquiescence in her possession, by his asking her for a loan of a portion of the money and his payment back of a part and promise to pay the whole.² A gift *mortis causa*, it would seem, may be upheld though resting on the wife's evidence alone; but this is especially true when such evidence is free from suspicion and corroborated, however slight the corroboration may be.³

245. PURCHASE OF LAND BY HUSBAND BUT CONVEYANCE TO WIFE.—If a husband purchase land and

¹ *Dyer v. Williams*, 62 Miss. 302.

² *King v. O'Brien*, 1 J. & S. (N. Y.) 49; *Cain v. Ligon*, 71 Geo. 692; *Walter v. Hodge*, Wils. Ch. 445. If land is conveyed to his wife at the purchaser's request it is presumed to be a gift: *Read v. Rahm*, 65 Cal. 343, though if conveyed to a stranger at the purchaser's request, he would hold it in trust for such purchaser: *Tryon v. Huntoon*, 67 Cal. 325. The forms of a gift must be observed or it will be void: *Atkinson v. Atkinson*, 15 La. Ann. 491; *Roberts v. Riker*, 2 Pa. Leg. Gaz. 131; *Faulk v. Faulk*, 23 Tex. 653; *Fitts v. Fitts*, 14 Tex. 443; *Bradshaw v. Mayfield*, 18 Tex. 21.

³ *McEdwards v. Ross*, 6 Gr. Ch. 373. See generally *Purdham v. Murray*, 9 Ont. App. 369, reversing 29 Gr. Ch. 443.

cause it to be conveyed to his wife, the presumption is that it is a settlement upon her ; but being a question of intention, he may repel such presumption.¹ His acts and declarations contemporary with the purchase and conveyance are admissible to show his intention in making the settlement, but his subsequent acts and declarations are excluded.² The husband cannot be asked in open court, when called as a witness, what his motives or intentions were when he made the settlement.³ The subsequent misconduct of the wife does not affect the settlement, even though the husband obtain a divorce from her because of such misconduct.⁴

¹ *Lister v. Lister*, 35 N. J. Eq. 49; *Linker v. Linker*, 32 N. J. Eq. 174; *Stevens v. Stevens*, 70 Me. 92; *Lux v. Hoff*, 47 Ill. 425; *Cotton v. Wood*, 25 Ia. 43; *Thomas v. Thomas*, 107 Mo. 459; *Darrier v. Darrier*, 58 Mo. 222; *Irvine v. Greer*, 32 Gratt. 411.

² *Gillespie v. Burleson*, 28 Ala. 551; *Garner v. Graves*, 54 Ind. 188; *Crain v. Wright*, 46 Ill. 107; *Cairns v. Colburn*, 104 Mass. 274; *Cormerais v. Wesselhoeft*, 114 Mass. 550; *Kelly v. Campbell*, 2 Abb. App. Dec. 492; *Ferris v. Parker*, 13 Tex. 385; *Ingersole v. Truebody*, 40 Cal. 603; *Moyer's Appeal* 77 Pa. St. 482; *McCampbell v. McCampbell*, 2 Lea, 661.

³ *Woods v. Whitney*, 42 Cal. 358; *Gillespie v. Walker*, 56 Barb. 185. See *Wormley v. Wormley*, 93 Ill. 544. The same rule applies to an advancement made by a parent to a child: *Betts v. Francis*, 1 Vr. 152; *Christy v. Courtenay*, 13 Beav. 96; *Williams v. Williams*, 32 Beav. 370; *O'Brien v. Sheil*, L. R. 7 1r. Eq. 255 (which criticises *Devoy v. Devoy*, 3 Sm. & Giff. 403); *Cartwright v. Wise*, 14 Ill. 417; *Sanderlin v. Sanderlin*, 24 Geo. 583; *Sharp v. Maxwell*, 30 Miss. 589; *Bradsher v. Cannady*, 76 N. C. 445; *High v. Stainback*, 1 Stew. (Ala.) 24; *McKane v. Bonner*, 1 Bail. L. 113.

⁴ *Bent v. Bent*, 44 Vt. 555; *Edgerly v. Edgerly*, 112 Mass. 175; *Orr v. Orr*, 8 Bush. 156; *Vreeland v. Ryno*, 26 N. J. Eq. 160; *S. C. 27 N. J. Eq. 522*; *Huntly v. Huntly*, 6 Ired. Eq. 514; *Weathersby v. Weathersby*, 39 Miss. 652; *Morrall v. Morrall*, L. R. 6 P. D. 98; *Charlesworth v. Holt*, L. R. 9 Exch. 38; *Porter v. Porter*, 27 Gratt. 599; *Baggs v. Baggs*, 54 Geo. 95; *Johnson v. Johnson*, Walk. Ch. 309. For prior misconduct see *Chew v. Chew*, 38 Ia. 405; *Switzer v. Switzer*, 26 Gratt. 574; *Grove v. Jeager*, 60 Ill. 249. That equity will not set aside a conveyance made in the expectation that the husband would survive the wife, when she survive him, see *Spring v. Hight*, 22 Me. 408; *Andrews v. Oxley*, 38 Ia. 578; *Cotton v. Wood*, 25 Ia. 43; *Bettle v. Wilson*, 14 Ohio, 257. By mistake property of a wife was conveyed to her and her husband jointly, and he agreed to convey it to her. Seventeen years afterward he did so, but after judgment had been rendered against him. It was held that this was no gift, and that the conveyance could not be attacked as fraudulent: *De Voe v. Jones*, 82 Ia. 66.

246. PRESUMPTION OF GIFT BY HUSBAND TO WIFE.—At common law the husband on marriage became entitled to all his wife's personal property which he might reduce to possession, and entitled to the rents and profits of her lands.¹ To this there was an exception; and that was where she held a separate estate especially restricted to her own use regardless of any future marriage she might make. So if during coverture she become the owner of any personal property or real estate the same rule applied, unless it was especially restricted to her separate use and benefit. It is, therefore, a general rule that the possession of the wife is the possession of the husband, and the evidence of a gift by him to her is not presumed from her manual possession of the subject-matter of the gift, even after his death when it is found in her possession. Such a possession, in fact, raises no presumption of a gift, not even of a delivery.² This presumption, however, may be rebutted, by his declarations, by her uncontradicted claims of ownership in his presence, or by their joint acts and conduct.³ So if a husband purchase an estate and have it conveyed to his wife the presumption is that it is a gift to her; but this presumption of a gift may be overcome by proof of antecedent facts or facts contemporaneous with the purchase, or immediately thereafter so as to be a part of the transaction, of as explicit a nature as is required to establish a resulting trust.⁴

¹ *Clarke v. King*, 34 W. Va. 631.

² *Walter v. Hodge*, 2 Wils. Ch. 445; *Turner v. Brown*, 6 Hun, 331. Evidence that the husband gave his wife money with which to purchase furniture, which she did, without further evidence tending to show a gift either of the money or furniture to her as her separate property, is not enough to show a gift to her of such furniture: *Estate of Ward*, 2 Redf. 251.

³ *Turner v. Brown*, 6 Hun, 331.

⁴ *Read v. Huff*, 40 N. J. Eq. 229; *Peer v. Peer*, 3 Stock. (N. J.), 432; *Persons v. Persons*, 25 N. J. Eq. 250; *Cutler v. Tuttle*, 19 N. J. Eq. 549.

247. PARENT'S GIFT TO HIS CHILD.—The presumption of a gift by a parent to his child is more quickly raised and requires less proof than if they were strangers in blood.¹ The financial condition of the parent and that of the child is often a potent factor to raise this presumption; for a wealthy parent is more apt to make a gift to his child, especially if the latter is in straitened circumstances, than a parent of the same temperament of small property under like circumstances. Cordiality of feeling existing between the parent and child is also a factor in raising this presumption; and in all instances the age of the parent should be considered; for a parent nearing the end of his life, and perceiving that he is well enough provided for and that there is little or no probability of his needing the property, very often feels more disposed to aid his child than one in the full vigor of life, and who rests under the uncertainty which surrounds all mankind whether he has, beyond scarcely a doubt, a sufficient property to keep him from want or poverty.²

248. GIFT BY PARENT TO CHILD WHEN THE LATTER IS MARRIED.—At an early day in many of the Southern States it was the custom for the father to give a child, when he married, a slave; and many cases arose involving the validity of transactions of this kind. As early as 1791 it was decided in North Carolina that if a father at the time of his daughter's marriage put a negro or other chattel into the possession of the son-in-law, it is in law a gift, unless the contrary can be proved. "For otherwise," said the court, "creditors might be drawn in by false appearances."³

¹ *Rhods v. Childs*, 64 Pa. St. 18.

² *Francis v. Love*, 63 Mich. 181. Where a father furnished his son money before and after his majority, there being no agreement concerning the transaction, it was held that the money was a gift: *Thurber v. Sprague*, 24 Atl. Rep. 48.

³ *Farrel v. Perry*, 1 Hay, 2.

Three years later the court held that if it was sent to the son-in-law "any short time after the marriage, it is to be presumed *prima facie*, that the property is given absolutely ;" "and when the property is permitted to remain in the possession of the son-in-law for a considerable length of time, it will be necessary to prove very clearly that the property was only lent by the father, and that it was expressly and notoriously understood not to be a gift at the time. The peace of families," says the court, "and the security of creditors, are greatly concerned in the law being thus settled. Every transaction in human life ought to be considered under its ordinary circumstances—these will sufficiently express the intention of the parties, and generally more unequivocally than the appointed solemnities of the law. This property was given in the manner—that is, sent with them on their going to house-keeping, as it is called, or sent to them as soon as the parent could make the necessary arrangements in his farm and family for that purpose." In this case part of the property was sent to the daughter's house seven years after her marriage, and the jury found that there was a valid gift.¹ But this rule of presumption was not limited to the gift of a slave ; it was extended to any kind of personal property delivered either to a son or a daughter under like circumstances ; and even to instances where a father, on the arrival of his son at the age of twenty-one, or at years of discretion, placed any personal property in his son's possession and permitted him to continue such possession, for a considerable time, and use it as his own.² So where a father put his son in possession of a plantation and slaves, and permitted him for three years to appropriate the crops to his own use,

¹ Carter v. Rutland, 1 Hay (N. C.), 97.

² Hollowel v. Skinner, 4 Ired. L. 165 ; Stallings v. Stallings, 1 Dev. (N. C.) Eq. 298.

the crop of the fourth year, as well as the preceding ones, were considered as gifts from the father to the son and liable to the claims of the latter's creditors.¹ The same rule prevailed in other States, and it may be deemed one of universal application.² The reason for this as

¹ *Skinner v. Skinner*, 4 Ired. L. 175; *State v. Bethune*, 8 Ired. L. 139; *Overby v. Harris*, 3 Ired. Eq. 253; *Parker v. Phillips*, 1 Hay, 451.

² *Olds v. Powell*, 7 Ala. 652; *Teague v. Griffin*, 2 N. & McC. (S. C.) 93; *Banks v. Hatton*, 1 Nott. & McC. (S. C.) 221; *Brashears v. Blassingame*, 1 Nott. & McC. (S. C.) 223; *Davis v. Davis*, 1 Nott. & McC. (S. C.) 224; S. C. 1 Brev. 371; *Johnston v. Dilliard*, 1 Hay (S. C.), 232; *Archer v. M'Fall*, Rice L. (S. C.), 73; *Lark v. Cunningham*, 7 Rich. L. 57; *Whitesides v. Poole*, 9 Rich. L. 68; *Henson v. Kinard*, 3 Strobb. Eq. 371; *Richmond v. Yongue*, 5 Strobb. L. 46; *Raiford v. French*, 11 Rich. L. 367; *Sims v. Saunders*, Harp. (S. C.) 374; *Nichols v. Edwards*, 16 Pick. 62; *Perry v. Graham*, 18 Ala. 822. "In order to warrant the presumption of a gift in such a case, it is not necessary that the property be sent to the residence of the married pair; it is enough if it be delivered to the husband, or suffered to go into their possession. So property in a slave, permitted by parents to go into possession of a daughter, on her marriage, rests in the husband of the daughter. In *Davis v. Duncan*, 1 McC. (S. C.) 213, it was held that where there was an acceptance and continued possession of property which a parent permitted to go into the possession of his son or daughter, upon his or her marriage, it may, by lapse of time be construed into a gift, though originally declared to be a loan. And in *Keene v. Macey*, 4 Bibb. 35, it was decided, that if a father delivers slaves to his son-in-law upon marriage, without avowing the purpose of the delivery, and the son-in-law retains possession for five years, it should be left to the jury to determine whether it was intended as a gift or a loan." *Hooe v. Harrison*, 11 Ala. 499; *Miller v. Eatman*, 11 Ala. 609; *Gillespie v. Burleson*, 23 Ala. 551; *Hill v. Duke*, 6 Ala. 259; *O'Neil v. Teague*, 8 Ala. 345; *Norris v. Bradford*, 4 Ala. 203; *Rumbly v. Stainton*, 24 Ala. 712; *Moore v. Dawney*, 3 H. & M. (Va.) 127; *Bell v. Strother*, 3 McC. 207. In this last case it is said that the time of the delivery is immaterial so far as it tends to raise the presumption of a gift: *De Graffenreid v. Mitchell*, 3 McC. 506; *Keaton v. Miller*, 38 Miss. 630; *Whitfield v. Whitfield*, 40 Miss. 352; *Henry v. Harbison*, 23 Ark. 25; *Smith v. Montgomery*, 5 T. B. Mon. 502. In this last case proofs of gifts to his other children at their marriage was held to strengthen the presumption of a gift. Proof of the donor having sent a slave to the home of his son-in-law raises the presumption of a gift: *Stump v. Roberts*, Cooke (Tenn.), 350; *Wade v. Green*, 3 Humph. 547. The secret intention of the father to only make a loan cannot invalidate the gift: *Owen v. Tankersley*, 12 Tex. 405. The purchase of land by a father and its conveyance to such child instead of to the father raises the presumption of a gift: *Vanzant v. Davies*, 6 Ohio St. 52.

In Missouri the rule is that sending property to a married daughter's home shortly after her marriage is evidence from which the court or jury may find that

given in the language of the reported cases is that any other rule would operate as a fraud upon creditors of the donee, who were deceived by the apparent ownership of property, in advancing credit to him; and as one of two innocent parties must suffer, he who had voluntarily brought about this condition of affairs must bear the loss. Many of the cases arose in contests between creditors of the donee and the donor over the ownership of property, and consequently this rule had an equitable application. But in time the rule was applied to contests between the donor and donee, and enforced, though, perhaps, not so rigorously as between the donor and the creditors of the donee; and instances of transactions between the donor and donee have probably been held not to amount to gifts, when as between the donor and the creditors of the donee it would be so held on the principle of estoppel.¹ The rule has met with a vigorous protest, upon the ground that it prevented dealings between parent and child in the way of aid by loans of the use of personal property, and regret has been expressed that it ever obtained a footing;² and it has been held that the rule does not apply to a transaction between persons not bearing the relation of parent and child, as the case of a step-father's allowing a slave to go into the possession of his step-child.³ It is manifest that where the subject-matter of the gift is trifling the reason for the rule that creditors of the donee were deceived by a show of property in the donee, and thereby induced to give

there was an actual gift: *Jones v. Briscoe*, 24 Mo. 498; *Mulliken v. Greer*, 5 Mo. 489; *Beale v. Dale*, 25 Mo. 301; *Fatheree v. Fletcher*, 31 Miss. 265; *Pendleton v. Mills*, Geo. Dec. pt. 166; *Falconer v. Holland*, 5 Sm. & M. 689; *Carter v. Buchanan*, 9 Geo. 539; *Lockett v. Mims*, 27 Geo. 207; *Bell v. McCawley*, 29 Geo. 355; *Rich v. Mobley*, 33 Geo. 85; *Butler v. Hughes*, 35 Geo. 200. *Contra*, *Moseby v. Williams*, 5 How. (Miss.) 520.

¹ *Burgess v. Chandler*, 4 Rich. L. 170; *Archer v. M'Fall*, Rice L. (S. C.) 73.

² *Henson v. Kinard*, 3 Strobh. Eq. 370.

³ *Wills v. Snelling*, 6 Rich. L. 280.

him credit, can have little or no application ; nor can mere volunteers claim the benefit with the same weight of claim that an actual creditor could.¹ But the presumption of a gift arising from the act of a father placing property in a child's possession under the conditions discussed herein may be rebutted ; and one of the most usual means of rebutting it is by the declarations of the donor and donee when the property was delivered, his declarations prior thereto, his subsequent declarations made in the presence of the donee and sanctioned by him, and the admissions of the donee against his interest, whether the contest is between the donor and donee or between the former and the latter's creditors.² When the donee has shown enough of the transaction to raise the presumption of a gift, the burden is upon the donor to rebut this presumption ; and for this purpose he may prove his declarations which form a part of the *res gestæ* ; his subsequent declarations in the presence of the donee when assented to by him, and his declarations prior thereto made in the presence of the donee, and even those not made in his presence.³ He may also show any other facts that tend to rebut the presumption, such as tend to convert the transaction into a loan, or contract of sale, or a bailment.⁴ Where the contest was

¹ Wills v. Snelling, *supra* ; Ramsey v. Joyce, McM. Eq. 226.

² Rumbly v. Stainton, 24 Ala. 712. Where the declarations show no intent to give, and a deed was afterward executed to carry out the conditions upon which the delivery was made, the prior oral declarations were held admissible: O'Neil v. Teague, 8 Ala. 345 ; Keene v. Macey, 4 Bibb. 35.

³ Smith v. Montgomery, 5 T. B. Mon. 502.

⁴ Hill v. Duke, 6 Ala. 259 ; Falconer v. Holland, 5 Sm. & M. 689 ; Freeman v. Flood, 16 Geo. 528. A receipt given by the donee is admissible as a declaration against interest : Nichols v. Edwards, 16 Pick. 62. Ten years' possession must be explained, it was held, by satisfactory proof that it was notoriously understood not to be a gift at the time ; and even then it is not too much to say that a strong presumption arises, which will warrant the inference of a subsequent gift, when the contract is between a creditor and the donor : Hill v. Duke, *supra*. A subsequent will in accord with the declarations made at the time of the delivery of the

between the donor and a creditor of the donee over a slave sent by the donor to his son-in-law's house shortly after his marriage, it was said that anything that would make the transaction less than a gift "must be made known to persons who give credit subsequent to the possession."¹ If the gift is out of all proportion with the donor's property and an unusual one under the circumstances that induced the donor to make it, or if some element of fraud is shown in the transaction, that may be considered in rebutting the presumption of a gift, and may be even sufficient to overcome such presumption.²

249. COMMENTS UPON PRESUMPTION ARISING FROM DELIVERY OF PROPERTY BY A PARENT TO HIS CHILD.—The cases cited in the foregoing section relate almost entirely to gift of slaves; a few, however, relate to other gifts, usually of household furniture. So, too, they almost entirely relate to gifts by a parent to a child on its marriage—usually to a daughter; yet one or two relate to a gift made to a child on reaching its majority. The rule deducible from them had its origin in a once well-established practice prevalent in the Southern States—of giving to a newly-married child a slave as a marriage portion; and the courts in declaring that the sending of a slave by the father to his newly-married child's home will be regarded as a gift, if unexplained, only followed up a much practiced habit of that part of our country.

property and against the claim of gift is admissible: *Miller v. Eastman*, 11 Ala. 609; *Stewart v. Cheatham*, 3 Yerg. 59. Admissions of donee: *Bell v. McCawley*, 29 Geo. 355; *Rich v. Mobley*, 33 Geo. 85.

¹ *Burgess v. Chandler*, 4 Rich. (S. C.) L. 170; *Ford v. Aiken*, 1 Strobb. L. 93; *Byrd v. Ward*, 4 McC. 228. The creditor need not show that the possession of the donee was adverse to that of the donor when he seeks to bind the latter on the ground that he had given the donee the appearance of being the owner of property: *Whitesides v. Poole*, 9 Rich. L. 68.

² *Moore v. Dawney*, 3 H. & M. 127.

And by reason and analogy it was applied to other property suitable for a parent to give to a child at such a time. It is only a reasonable presumption raised by our every-day experience ; and the courts in adopting such a rule only showed their attention to the every-day affairs of life, and applied a rule based on common sense in carrying out the intention of the donor and donee. But in the South the gift of slaves became one of fraud so far as creditors of the donor and donee were concerned ; for if the donee should become indebted and be about to lose the slave, the father would claim it as his own and the son would acquiesce ; and so when a creditor of the donor levied on the slave that was in fact his slave, the donee would claim it and the donor would acquiesce in the claim. To remedy this defect, statutes were passed requiring all gifts of slaves to be by deed, and rendering the deed either inoperative or void against creditors of the donor until recorded in some office of public record. In some instances the statute made the gift void even as between the donor and donee. Hence, in latter years of slavery these kind of cases were less frequently before the courts ; and those cited are nearly all of the first quarter of the present century. But the vital question with us, does the principle on which they depend now apply to gifts to a newly-married child ? or to any child of the donor ? There is no reason why they should not. The principle running through them has been applied to gifts of personal property, and to a child arriving at his majority ; and it is just as applicable to a child in after life living apart from his father or mother as to a child recently married. The only difference is that the claim of a gift to a child in after life may be more easily rebutted than the claim that a transaction immediately after marriage shows a gift ; and in such an instance common

experience is only be drawn upon. In one case cited in the foregoing section a gift made eight years after the marriage of the child was upheld. In some of the cases the qualification is added to the statement of the general rule "and suffered to remain in the possession of the child for a long period," generally enumerating several years ; but these expressions are only used because the facts occur in the case ; and while the permitting of the subject-matter of the gift to remain a period of several years will add to the presumption of a gift and require stronger evidence of rebuttal to overcome that presumption, yet such a period of time is not indispensable, and the absence of the period of time, or the fact of only a short period, is simply a circumstance tending to weaken the presumption of an actual gift.

250. PRESUMPTION ARISING FROM PARENT ADVANCING MONEY TO HIS CHILD—LOAN.—If a parent advances money to a child, it is supposed to be by way of a gift and not a loan.¹ The force of this presumption is not weakened by the fact that the child gave to his parent a statement in the form of an account of the several sums of money so given him.² Where it was shown that a father had formerly given his children a like gift on their marriage, the father's declarations, after making such gifts to his other children, that he would not again give away a slave to his remaining daughters on their marriage, but whatever advancement he might make should be a loan were admitted to rebut the presumption of a gift.³

¹ *Hick v. Keats*, 4 B. & C. 69 ; *Whitfield v. Whitfield*, 40 Miss. 352 ; *Swartz v. Hazlett*, 8 Cal. 118 ; *Smith v. Montgomery*, 5 T. B. Mon. 502.

² *Johnson v. Ghost*, 11 Neb. 414.

³ *Smith v. Montgomery*, 5 T. B. Mon. 502 ; *Lockett v. Mims*, 27 Geo. 207.

Presumption that gift is a satisfaction of a debt, when : *McClure v. Miller*, 1 Bail. Eq. 107.

251. PRESUMPTION OF GIFT ARISING FROM PROOF OF POSSESSION.—Proof of manual possession in the donee is always an element in his favor; and if he acquired that possession in connection with words of gift expressing an intent to give, it raises a very strong presumption of a gift, and is very often the turning point in the transaction. But manual possession in the donee is always subject to explanation; and its force in upholding the claim of the donee, that the transaction amounted to a gift, is greatly weakened if the donor is dead and the donee had ready access to his property and effects.¹ This is readily perceived where the donor and donee maintained fiduciary relations toward each other, or resided together and the article is such as is usually kept in residences or living rooms, or in offices which they jointly occupied. Possession in a stranger, not inhabiting the same house and not jointly occupying in business the same store or office with the donor, when words of gift are shown, is much stronger evidence of a gift than proof of possession when the donor and donee maintained close personal relations and actual business contact in the every-day affairs of life. Thus where a bond and mortgage were found, after the mortgagor's death, in a tin box of his, containing paid notes, papers of old dates, bills of goods, old outlawed notes due him, and other miscellaneous papers; and there was proof of a declared intention of the mortgagee to give the bond and mortgage to his daughter (the wife of the mortgagor), it was held that in the absence of any evidence casting suspicion upon the *bona fides* of the possession of the securities of the mortgagor, at the time of his death, such possession was presumptive evidence of a gift to his wife.² Possession in

¹ Conklin v. Conklin, 20 Hun, 278; Grey v. Grey, 47 N. Y. 552.

² Hackney v. Vrooman, 62 Barb. 650; Shower v. Pilek, 4 Exch. 478. Possession of property is presumptive of title in the possessor. If an unmarried son

the donee for a long period of time raises a stronger presumption of gift than for a short time. Thus it was said that seven years' possession of a slave by the donee, a stranger to the donor, unexplained, would give him title.¹

252. DONEE'S ACCESS TO DONOR'S PAPERS AND SECURITIES.—The right of access the donee may have had to the donor's papers or securities, when either is the subject-matter of the gift, must always be considered, especially in a *donatio mortis causa*. In such instances the opportunity for fraud, by gaining possession of the subject-matter, is always quite easy; and thereby one of the most onerous burdens of establishing a gift, by proving a delivery, is greatly aided. In such an instance the fact of possession should have little weight.²

resides with his father, the presumption is that the property on the homestead belongs to the father, and if the father lives with his son, the presumption is the other way. If the possession is joint, the presumption is in favor of the party who exercises principally, if not exclusively, acts of individual control and dominion over the property: *Reid v. Butt*, 25 Ga. 28.

¹ *Bell v. Strother*, 3 McC. 207. The finding of the article claimed by way of gift in the possession of the donor at his death is very strong evidence against the claim of a gift: *Antrobus v. Smith*, 12 Ves. 39. See *Shower v. Pilck*, 4 Exch. 478. Replevin of a church meeting-house bell. Proof by the plaintiff that the bell and frame had been in their possession for several years, and had been used by them for parish purposes. Proof by the defendant that it had been purchased by subscription, the defendant and others being subscribers, and was by them hung up in the meeting-house by the plaintiff's permission. Proof also that at a meeting of the parish it was voted "that the subscribers for a bell have leave to place the same in a convenient place in the meeting-house to be rung." It was also voted that the bell should be the property of the subscribers, subject to their control and direction. It was held that these votes rebutted the presumption of a gift: *Fourth Parish v. Root*, 18 Pick. 318. A note indorsed to the donee, or in blank, when found in his possession raises the presumption of a gift: *Breier v. Weier*, 33 Ill. App. 386.

² *Shirley v. Whitehead*, 1 Ired. Eq. 130; *Cummings v. Meaks*, 2 Pitts. 490; S. C. 11 Pitts. L. J. 291; *Stevens v. Stevens*, 2 Redf. 265. This is especially true where the executor or administrator is the donee in the case of a *donatio mortis causa*: *Parkin v. Day*, 6 Wkly. Dig. 113.

253. PRESUMPTION THAT GIFT WAS A PAYMENT OF A DEBT.—If a person indebted pay money to his creditors without specifying for what purpose, the presumption is that it was intended as a payment of the debt between them, especially if the amount of the debt and the payment are equal; but this presumption does not arise if the person paying expressly declared it to be a gift.¹

254. EVIDENCE OF ACCEPTANCE—PRESUMPTION.—If the gift is of value, the law presumes an acceptance; in fact, the law in all instances presumes an acceptance if the donee is informed of the gift, even of a conditional gift.² The donee may testify in direct terms that he accepted the gift; and he may show a subsequent demand of the property given, and efforts to obtain its possession, even if it should come into the hands of the donor's executor.³

255. SANITY OF DONOR.—In claiming title to property by gift the donee is not required to show that the donor was, at the time of the gift, of sound disposing mind and memory, nor that it was his free will and act. Insanity and undue influence are matters of defence.⁴

256. EQUITY WILL NOT AID AN IMPERFECT GIFT—SPECIFIC PERFORMANCE.—It is simply reiteration of what has elsewhere been stated, that a court of equity will not aid an imperfect gift. The donor must himself have per-

¹ McClure v. Miller, Bail. Ch. 107.

² Thouvenin v. Rodrigues, 24 Tex. 468; Love v. Francis, 63 Mich. 181. See Section 79.

³ Hunter v. Hunter, 19 Barb. 631.

⁴ Bedell v. Carll, 33 N. Y. 581. Where the plaintiff claimed by gift and the defendant by a subsequent will, testimony to show the insanity of the common donor was held to be irrelevant: Bryant v. Ingraham, 16 Ala. 116. But if there be an interval of time between the making of the gift and the will, during which the donor had actually gone insane, and so remained at the time of making the will, there is certainly no reason why that fact cannot be shown.

fecting the gift, as far as within him lay the possibility to do so, before the donee can come into court and successfully claim protection of his alleged property in the gift.¹

257. DEFENDANT MAY SHOW GIFT INVALID.—Whenever the donee brings an action concerning the subject-matter of the gift and asserts that he is the owner thereof, the defendant, whether the owner, the donor's bailee, or even a claimant without right as against the donor, may show that the intended gift is invalid.²

258. STATUTE OF LIMITATIONS.—Gifts that are invalid may be perfected by long acquiescence of the donor, or by a claim by the donee of the right to the property given, even though the claim is made as such donee. The fact that he claims as donee does not prevent his claiming title by adverse possession.³

259. GIFT TO A CLASS—TO WHOM AS DONEES.—Property may be given by will to be distributed among a class of persons at a future time, or on the happening of a certain contingency. In such an instance all the donees who come into existence before the time or happening of the event are let in, and none except those answering the description in the will can take. This is because the will speaks at the time of the testator's death, and those who answer the description of the legatees at that time will take unless a contrary intention appears. Such is not,

¹ Upon this subject there is abundance of authority: *Lee v. Magrath*, L. R. 10 Ir. 45; S. C., p. 313; *Robson v. Jones*, 3 Del. Ch. 51. Equity will not even aid to establish a trust: *Bayley v. Boulcott*, 4 Russ. 345; *Glass v. Burt*, 8 Ontario, 391; *Smith v. Dorsey*, 33 Ind. 451; *Houghton v. Houghton*, 34 Hun, 212; *Brownlee v. Fenwick*, 103 Mo. 420; *Anderson v. Scott*, 94 Mo. 637.

² *Jackson v. Twenty-third St. Ry. Co.*, 88 N. Y. 520.

³ *Sumner v. Murphy*, 2 Hill L. 487; *M'Elwee v. Martin*, 2 Hill L. 496; *Pate v. Barrett*, 2 Dana, 426.

however, the case with a deed of gift or gift *inter vivos*; for the deed or oral gift speaks at the time when made, and the donees under it must be such as answer the description at that time.¹

260. DENYING DONOR'S TITLE.—The donor cannot set up as a defense that at the time he had no title to the subject-matter of the gift.²

261. ADMINISTRATOR OR EXECUTOR NOT ENTITLED TO THE POSSESSION.—Neither the administrator nor the executor is entitled to the possession of the subject-matter of the gift, even of a *donatio mortis causa*. He has no title in or to it unless the property is necessary to pay creditors of the donor. If the administrator take possession of the gift, the donee may maintain trover against him, after demand, for the property;³ and if he has converted it into assets for the estate, an action for its value lies against him in his representative capacity.⁴

262. VALIDITY OF GIFT WHEN CREDITORS NOT CONCERNED—GIFT BETWEEN KIN.—When the rights of creditors are not involved and the gift is within the family, the rules as to the validity of a gift are not so rigidly adhered to; and the gift will be upheld though the evidence be meagre.⁵ It is quite evident, however, that this very just rule has not been recognized by many

¹ *M'Meekin v. Brummet*, 2 Hill Ch. 638.

² *Rinker v. Rinker*, 20 Ind. 185; *Adams v. Lansing*, 17 Cal. 629.

³ *Marsh v. Fuller*, 18 N. H. 360; *Lord v. Vreeland*, 24 How. Pr. 316; *Estate of Chalker*, 5 Redf. 480; *Van Slooten v. Wheeler*, 21 N. Y. Supp. 336.

⁴ *Mann v. Mann*, 2 Rich. L. 123. If the maker of a note pay it to the administrator, whose decedent had made it a *donatio mortis causa*, without the production of the note, he cannot, when sued by the donee, set up payment to the administrator: *House v. Grant*, 4 Lans. 296.

⁵ *Fowler v. Lockwood*, 3 Redf. 465. See *Kurtz v. Smither*, 1 Dem. (N. Y.) 399; *Harris v. Hopkins*, 43 Mich. 272.

of the courts, especially those of England, until a late day. In scores of instances courts have required of a wife or a child as strict proof as if they were strangers to the donor; and there are many instances in which they have regarded the gifts with suspicion, because of the close intimacy existing between the donors and donees. Such a rule more often tends to subvert justice than to promote it, and more often to thwart the intentions of donors than to consummate them.¹ One who purchases the subject-matter of the gift from the donor, with a knowledge that the donor's title has been rendered doubtful by his attempt to give it, is in no better position than the donor himself when the validity of the transaction is attacked.² In all contests of this character, the donee cannot pose as an innocent purchaser³ unless, perhaps, he has bestowed labor or money upon the article given to the extent that to require him to relinquish it would entail upon him a loss far beyond the benefit he has received by the use of the property. If, however, all the forms of a valid gift have been observed, the purchaser, however innocent, cannot claim the subject-matter of the gift from the mere fact that he was deceived by appearances.⁴

263. WHEN TITLE PASSES.—We have elsewhere discussed the question, when does the title pass in a gift *mortis causa*? In the case of a gift *inter vivos* the cases are not one as to the time the title passes. In England the ques-

¹ See *Boudreau v. Boudreau*, 45 Ill. 480, where "reasonably strict proof of the gift" was required.

² *Barker v. Frye*, 75 Me. 29.

³ *Swartz v. Hazlett*, 8 Cal. 118; *First Nat. Bank v. Wood*, 128 N. Y. 35; *Gillan v. Metcalf*, 7 Cal. 137; *Hatch v. Lamos*, 65 N. H. 1.

⁴ *Turner v. Thurmond*, 28 Geo. 174; *Bell v. McCawley*, 29 Geo. 355; *Landrum v. Russell*, 29 Geo. 405; *Joeckel v. Joeckel*, 56 Wis. 436; *Moultrie v. Jennings*, 2 McMull. 508; *Cummings v. Coleman*, 7 Rich. Eq. 509; *Caston v. Cunningham*, 3 Strob. L. 59.

tion was considered at considerable length. There an aged lady caused a large amount of consols to be transferred into the joint names of herself and her godson, doing so with the express intention that he, in the event of surviving her, should have them for his own benefit, but that she should have the dividends during her life. At the time she was warned that if she did so she could not revoke the legal effect of the transaction. The first notice the godson had of the gift was two years afterward, when her solicitors wrote him claiming to have the fund retransferred to the donor. The court held that when the transfer was made the legal title vested in the donee, notwithstanding his ignorance of the gift and the absence of his assent, and that the gift was valid and irrevocable. In this case the transfer was upon the books of the Bank of England. "If the matter were to be discussed now for the first time," said Lord Holsbury, "I think it might well be doubted whether the assent of the donee was not a preliminary to the actual passing of the property. You certainly cannot make a man accept as a gift that which he does not desire to possess. It vests only subject to repudiation."¹ There are cases, however, which hold that the title does not pass until the donee assents to the gift, when it is placed in the hands of a third person.² If the gift is made directly to the donee, then the title does not pass until he assent; and no title can pass until there has been a delivery, or the donee has constituted himself a trustee for the donor.³

¹ *Standing v. Bowring*, L. R. 31 Ch. Div. 282; reversing 27 Ch. Div. 341; *Butler and Baker's Case*, 3 Coke Rep. 26 *b*; *Thompson v. Leach*, 2 Vent. 198; *Siggers v. Evans*, 5 E. & B. 367; *Smith v. Wheeler*, 1 Vent. 128; *Small v. Marwood*, 9 B. & C. 300. See *Hurlbut v. Hurlbut*, 49 Hun, 189; *Thomas v. Thomas*, 107 Mo. 459; *Barnum v. Reed*, 136 Ill. 388.

² *Thompson v. Gordon*, 3 Strob. L. 196. Under the head of Revocation will be found cited a number of cases to this effect.

³ *Donatio mortis causa*. See Section 46.

264. COMPETENCY OF DONEE AS A WITNESS.—A donor, in an action between the donee and creditors of the donor involving the validity of the gift, is a competent witness, and he is not disqualified on account of interest.¹ So the husband of the donee has been held competent to show that the transaction with his wife was a loan and not a gift under like circumstances.² And a wife, it has been held, is a competent witness in an action against her husband's executor, to prove a parol gift by him, the dissolution of the marriage by death removing the objection arising out of the conjugal relation.³ But the weight of authority, both in principle and number of cases, is that she is not a competent witness.⁴ So under a statute providing that no party to an action, or person directly interested in the event thereof, shall testify therein of his own motion when any adverse party sues or defends as the executor or administrator of any deceased person, the husband of an alleged donor, in an action between her administrator and one claiming certain property as a gift, the subject of the litigation involving the validity of the gift, is not a competent witness on behalf of the administrator as to matters occurring before her death.⁵ So a donee, in an action against the administrator of the donor's estate, is not, it has been held, a competent witness in his own behalf.⁶ But, on the contrary, donees have

¹ *Easley v. Dye*, 14 Ala. 158; *Durham v. Shannon*, 116 Ind. 403; *Smith v. Littlejohn*, 2 McCord L. 362. See *Devlin v. Greenwich Savings Bank*, 125 N. Y. 756.

² *Watson v. Kennedy*, 3 Strob. Eq. 1.

³ *Caldwell v. Stuart*, 2 Bail. L. 574.

⁴ *Trowbridge v. Holden*, 58 Me. 117; *Conklin v. Conklin*, 20 Hun, 278; *Hay v. Hay*, 3 Rich. Eq. 384; *Schick v. Grote*, 42 N. J. Eq. 352; *Hopkins v. Manchester*, 16 R. I. 663.

⁵ *Conner v. Root*, 11 Colo. 183.

⁶ *Cornell v. Cornell*, 12 Hun, 312; *Wertz v. Merritt*, 74 Ia. 683. This is especially true where the executor is the donee: *Smith v. Burnet*, 34 N. J. Eq. 219; *S. C.* 35 N. J. Eq. 314; *White v. White*, 16 Wkly. Dig. 45; *Waver v. Waver*, 15 Hun, 277.

been admitted to testify to the transaction constituting even a *mortis causa*.¹

265. PLEADING.—Under a general allegation of a gift, the donee may show either a gift *inter vivos* or *mortis causa*.² Under the chancery practice it is necessary to set out in detail the facts showing a gift, and the general allegation that a gift was made is insufficient. So, too, under that practice, if the allegations show a gift *inter vivos*, proof of a gift *mortis causa* cannot be introduced.³

266. QUESTIONS FOR JURY.—Whether or not the alleged donor intended to make a gift, and whether or not there was a delivery, actual or constructive, are questions for the jury, under the instructions of the court, where the delivery is controverted as to what is sufficient to constitute it.⁴

¹ M'Gonnell v. Murray, 3 Ir. Eq. 460 (1869); Cosnahan v. Grice, 15 Moo. P. C. 215.

² Walsh v. Bowery Savings Bank, 15 Daly, 403; S. C. 26 N. Y. St. Rep. 95; 28 N. Y. St. Rep. 402; 7 N. Y. Supp. 97, 669. See Bedell v. Carll, 33 N. Y. 581, 586.

³ Walter v. Hodge, 1 Wils. Ch. 445.

⁴ M'Cluney v. Lockhart, 4 M'Cord, 251; Thomas v. Degraffenreid, 17 Ala. 602; Hassell v. Tynte, Ambl. 318; Richards v. Symes, 2 Atk. 319; S. C. 3 Barnard. 90; 2 Eq. Cas. Abr. 617; Hambrooke v. Simmons, 4 Russ. 25; Jacques v. Fourthman, 137 Pa. St. 428. If equivocal language has been used, it is a question for the jury whether the donor intended a gift: Keeney v. Handrick, 23 Atl. Rep. 1068.

CHAPTER XI.

NOTES AND CHOSSES IN ACTION.

267. Choses in Action.
268. Note Payable to Order and Undorsed by Payee.
269. Same Continued—*Duffield v. Elwes*—Trustee—Mortgage—Statute of Frauds.
270. Unassigned Note, Question Settled.
271. American Decisions Upon Unassigned Choses in Action.
272. Sealed Note.
273. All Unassigned Instruments the Subject of Gift.
274. Gift of Notes Carries Mortgage—Gift of Mortgage Does Not Carry Note.
275. Draft or Bill of Exchange.
276. Gift of Part of Note.
277. Memorandum.
278. Non-transferable Instrument.
279. Bank Account.
280. Gift of Receipt for the Instrument Given.
281. Policy of Insurance.
282. Gift of Bond or Note Merged in a Judgment—Gift of Judgment.
283. Statutory Regulations Affecting Transfer.
284. Note Given to Equalize Distribution of Estate—Legacy Duty.
285. Check Operates as an Equitable Assignment of a Specific Deposit.
286. Personal Representative Collecting Proceeds of Note Given.
287. To Whom Payment Made.
288. Donor's Liability on Indorsement.
289. Gift of Expectancy.
290. Consideration for the Note Given—Inadequacy of Consideration.
291. Desire or Intention to Make a Gift Not Sufficient.
292. Delivery Essential to Validity of Gift.
293. Redelivery of Note.
294. Gift by Deed.
295. Production of Note, Effect Upon Presumption of Ownership.
296. Forgiving Debt.
297. Receipt for Debt.
298. Note Made Payable to Third Person.
299. Note Payable to Husband and Wife, or to Two or More Persons—Delivery—Survivorship.
300. Note of Donor Payable to Donee.
301. *Lawson v. Lawson*—Gift for Mourning.
302. Note of Donor Payable to Donee is Valid.
303. Donor's Own Mortgage to Donee.
304. Subscription to a Charity, Church, College, etc.
305. Acceptance of Subscription.
306. Acceptance—Revocation—Death of Subscriber.
307. Who May Sue Upon Subscription.
308. Sunday Subscriptions.
309. Conditional Promise—Consideration.
310. Liability of a Single Donor or Subscriber—Mutual Subscriptions Not Sufficient to Bind Donors.

267. CHOSE IN ACTION.—A chose in action, such as

notes, bonds, written contracts, and the like, held by the donor, may be the subject of a gift either *inter vivos* or *mortis causa*. The early authorities contain evident misgivings upon the subject and hedge around such gifts with difficulties; but as early as 1710 it was admitted that a government "tally," which may be regarded as nothing more than a claim against the government,¹ could be the subject of a gift *mortis causa*.² So in 1744 the same doctrine was recognized as applicable to a bond,³ and afterward to a bank-note payable to bearer.⁴ The argument against the validity of the gift of a bond was that there was no actual delivery, the note or bond being but a chose in action, and therefore there was no delivery but of the paper. But it was answered that though it were true that a bond, which is a specialty, is a chose in action, and its principal value consists in the thing in action, yet some property is conveyed by the delivery; and to the degree that the law books say the person to whom the specialty is given, may cancel, burn, and destroy it; the consequence of which is that it puts it in his power to destroy the obligee's power of bringing an action, because no one can bring an action on a bond without a profert in court. Another thing, it was answered, made it amount to a delivery, that the law allowed it a locality; and therefore a bond is *bona notabilia* so as to require a prerogative administration, where a bond is in one diocese and goods in another. In the case from which this argument has been drawn, nearly all in the language of the court, care was taken to call attention to the difference then in law between a specialty and a note; for it was said that the destruction of a specialty, which is

¹ Jacob's Law Dict., subject "Talley."

² Jones v. Selby, Finch's Prec. in Ch. 300.

³ Snellgrove v. Bailey, 3 Atk. 214.

⁴ Miller v. Miller, 3 P. Wms. 356.

the foundation of the action itself, destroyed the demand, but the delivery of a note payable to bearer was only a delivery of the evidence of the contract, and not a good delivery of the possession of the money represented by the note. And the court proceeds to illustrate its position by saying that if one were to loan money taking back a receipt for it, and a mortgage to secure its payment, the receipt being evidently in no way a promise to pay but merely evidence of payment made of the money described in the mortgage, and the mortgagee delivers over the receipts as a gift of the money and the mortgage securing it, that would not have been a valid delivery; for neither the possession of the money nor the mortgage would have been made, which was essential to the validity of the gift.¹

268. NOTE PAYABLE TO ORDER AND UNINDORSED BY PAYEE.—The old cases hold unqualifiedly that a note payable to the order of the payee, unindorsed by him, or, if indorsed by him to a particular person, unindorsed by the indorsee, cannot be made the subject of a gift *inter vivos* or *donatio mortis causa*. Thus in 1735 it was said: “But then as to the note for £100 which was merely a *chose in action*, and must still be sued in the name of the executor, that cannot take effect as a *donatio mortis causa*, inasmuch as no property therein could pass by the delivery.”² A number of early cases hold to this rule.³ But at an early date⁴ this doctrine was much shaken, and the decision then rendered finally became the rule of decision in England. The case was one of a bond delivered by the payee, without indorsement or assignment, to the donee as a gift *mortis causa*. The court held it

¹ Ward v. Turner, 2 Ves. Sr. 431.

² Miller v. Miller, 3 P. Wms. 356.

³ Ward v. Turner, 2 Ves. Sr. 431; Parthrick v. Freind, 2 Colly. 362.

⁴ 1744.

sufficient to pass the equitable interest of the donor, and refused to decree that the donee deliver up the bond to the administrator of the donor. The court by way of illustration said: "Put the case, if a chattel in possession had been bought by the intestate, and the bill of sale taken in a third person's name in trust, the legal property would have been in the trustee, and only the equitable interest in the *cestui que trust*; and yet if the *cestui que trust* had delivered it over to the defendant, that would have been a good gift *donatio causa mortis* as to the equitable property. This comes very near the case of a chose in action, and the cases are so."¹ Another early case was decided nearly three-quarters of a century afterward. That was a gift of a bond as a *donatio mortis causa*; and the court held it valid, and liberty was granted to the donee by the court to use the executors' names in suing on the bond, he indemnifying them. The court said that "the case of *Snellgrove v. Bailey*² has established that there may be a *donatio mortis causa* of a bond, though not of a simple contract, nor by the delivery of a mere symbol."³ The question was virtually put to rest by a decision of the House of Lords in 1827, though the legitimate deduction to be made from that case does not seem to have been acquiesced in until 1859.⁴ In the House of Lords case, a donor made a gift, as the court found, *mortis causa*, of a conveyance in fee of lands to secure a certain sum of money, with the usual covenant for payment of the money lent, and a bond by way of

¹ *Snellgrove v. Bailey*, 3 Atk. 214. The court relied upon *Drury v. Smith*, 1 P. Wms. 404, where a testator, having made a will disposing of all his estate, afterward gave by parol a note to one, to deliver over to his nephew, if the testator should die of his present sickness. The nephew brought a bill against the executrix for the note, and the gift was upheld.

² 3 Atk. 214.

³ *Gardner v. Parker*, 3 Madd. Ch. 184.

⁴ *Veal v. Veal*, 27 Beav. 303; 6 Jur. (N. S.) 527; 29 L. J. Ch. 321.

collateral security; also an assignment of a mortgage debt of another certain sum, and of a judgment for that sum recovered on a bond with a conveyance of the land, and the usual covenant for payment of the money. There was no assignment in writing by the donor to the donee of these securities; but the gift was upheld.

269. SAME CONTINUED—DUFFIELD *v.* ELWES—TRUSTEE—MORTGAGE—STATUTE OF FRAUDS.—The real question involved was stated at length by Lord Eldon, as follows: “Whether the act of the donor being, as far as the act of the donor itself is to be viewed, complete, the persons who represent that donor, in respect of personalty—the executor, and in respect of realty—the heir-at-law, are not bound to complete that which, as far as the act of the donor is concerned in the question, was incomplete; in other words, where it is the gift of a personal chattel or the gift of a deed which is the subject of the *donatio mortis causa*, whether, after the death of the individual who made that gift, the executor is not to be considered a trustee for the donee, and whether, on the other hand, if it be a gift affecting the real interest—and I distinguish now between a security upon land and the land itself—whether if it be a gift of such an interest in law, the heirs-at-law of the testator is not by virtue of the operation of the trust, which is created not by indenture but a bequest arising from operation of law, a trustee for that donee.” And he added: “I apprehend that really the question does not turn at all upon what the donor could do, or what the donor could not do; but if it was a good *donatio mortis causa*, what the donee of that donor could call upon the representative of the donor to do after the death of that donor.” After a lengthy discussion of the cases, Lord Eldon declared: “The opinion I have formed is that this is a good *donatio*

mortis causa, raising by operation of law a trust; a trust which, being raised by operation of law, is not within the statute of frauds, but a trust which a court of equity will execute; and therefore, in my humble judgment, this declaration must be altered by stating that this lady, the daughter [the donee], is entitled to the benefit of these securities.”¹ The court commented at length upon a decision of Lord Hardwicke’s,² wherein his lordship had decided that if a mortgagee gave to a mortgagor the deeds of the mortgage, the statute of frauds would not stand in the way, and the gift was a valid gift of the money for which the deeds were a security.³ Some thirty years after the decision by the House of Lords, the Court of Exchequer held that a gift *inter vivos* of two mortgages or debentures, assuming that the property in the mortgage debts did not pass by such gift, yet that the donor’s executor could not maintain detinue for the documents against the donee. In the argument of the case it was said that the question was whether the property in the mortgage debts passed to the donee, to which Martin, B., said: “Surely this is not the question. If the obligee of a bond gives it to a third person, the obligee’s executors cannot claim back the paper on which the bond is written, though the gift may not operate as a valid assignment of the debt.” The court refused to enter a decree giving the documents to the executors; for the gift was a valid gift of the parchment, and the claim that because the gift failed the donee got no title to the documents could not be upheld.⁴

¹ Duffield v. Elwes, 1 Bligh (N. S.), 497, reversing 1 Sim. & St. 239; S. C. 1 L. J. Ch. 239.

² Richard v. Symes, 2 Atk. 319; S. C. 3 Barn. 90; 2 Eq. Cas. Abr. 617.

³ Lord Eldon points out that the case of Hassel v. Tynte, Ambl. 318, was really not a decision on this point, although Lord Hardwicke expressed a doubt whether a mortgage deed could be made the subject of a gift.

⁴ Barton v. Gainer, 3 H. & N. 387. The court quoted Sheppard’s Touchstone, p. 249, as follows: “A man may give or grant his deeds—*i. e.*, the parchment,

270. UNASSIGNED NOTE—QUESTION SETTLED.—In 1859 the question was put at rest in England by a decision of the Master of the Rolls. That was a case of an unassigned note as a *donatio mortis causa*, and it was held to be a valid gift. After reviewing the decisions, the Master admitted the embarrassment under which he labored, but put his decision upon a then unreported case,¹ decided in 1832 by Sir John Leach, whose decision in *Duffield v. Elwes* was overruled by Lord Eldon in the House of Lords. For this reason the Master attached peculiar significance to his decision in this unreported case. The facts in the unreported case were that bills were drawn on the East India Company in favor of Colonel Weguelin or order, and were accepted; but it did not appear from the papers whether they were indorsed by Colonel Weguelin or not. Shortly before his death, Weguelin gave the bills to his wife. The Master in taking an account of the estate included them in the outstanding estate of the testator; but the widow took exception to his report, and Sir John Leach sustained them and made a declaration that there was a good *donatio mortis causa*. The Master of the Rolls, in the case of 1859, after reviewing the authorities and this then unreported case, says: "I also think it a much more healthy state of the law that the validity of such a gift should not depend on whether the testator had written his name on the back of the bills or not, if it be clear that he intended to give

paper, and wax—to another at his pleasure, and the grantee may keep or cancel them. And, therefore, if a man have an obligation he may give or grant it away, and so sever the debt and it."

Bank notes have been held the subject of a gift from an early date: *Powel v. Cleaver*, 2 Bro. C. C. 500; *Miller v. Miller*, 3 P. Wms. 356.

¹ *Rankin v. Weguelin*, Reg. lib., B. 1831, folio 2385, now reported in 27 Beav. 309. See *McCullouch v. Bland*, 2 Giff. 428; S. C. 6 Jur. N. S. 1183; 3 L. T. N. S. 357; 9 W. R. 657, and *Richardson v. Richardson*, 3 L. R. Eq. 686; S. C. 36 L. J. Ch. 653.

them.”¹ Taking this view of the matter, the donor’s writing his name across the back of the paper is only evidence of his intention to make the gift ; and that intent and his acts therewith connected may be proved aside from such indorsement. The old rule that impeded the holding of such gifts as valid, because the donee could not maintain an action thereon,² is swept away by the more enlightened rule which compels the personal representative of the donor, upon being indemnified for whatever costs he may be compelled to pay, to permit the action to be brought in his name ; or by the equitable rule enforced by statutes or codes that the real party in interest may bring an action upon a note he holds, whether it was indorsed to him or not, leaving the matter of non-indorsement as a question of evidence. Indeed, it is said in an American case that “the true reason why a bond will pass to a donee *causa mortis* is not because he has the power of destroying it, nor because proferat must be made of it when sued, nor even because it is a security of a higher nature than some other choses in action ; but it is because the donee has in equity a right to enforce payment of it and to treat the executors of the donor as trustees for his benefit. In other words, a bond, like a note of a third person, is assignable in equity ; and the principle that courts of equity will not compel the completion of a mere voluntary gift or conveyance does not apply to donations *causa mortis*.”³

271. AMERICAN DECISIONS UPON UNASSIGNED CHOSSES IN ACTION.—The American courts had the advantage of this discussion on this point under consideration, and

¹ Veal v. Veal, 27 Beav. 303.

² Miller v. Miller, 3 P. Wms. 356.

³ Brown v. Brown, 13 Conn. 410 ; S. C. 46 Am. Dec. 323. See Kiff v. Weaver, 94 N. C. 274.

reached a conclusion with much more ease than they otherwise would have done. In Massachusetts it was decided, in 1837, that an unassigned or unindorsed note could be the subject of a valid *donatio inter vivos*. In answering the objection that such a gift was void the court said: "But as a good and effectual equitable assignment of a chose in action may be made by parol, and as courts of law take notice of and give effect to such assignments, there seems to be no good foundation for this objection. It is true that the cases, which are numerous, in which such equitable assignments have been supported, are founded on assignments for a valuable consideration; but there is little, if any, distinction in this respect between contracts and gifts *inter vivos*; the latter, indeed, when made perfect by delivery of the things given, are executed contracts. By delivery and acceptance the title passes, the gift becomes perfect, and is irrevocable. There is, therefore, no good reason why property thus acquired should not be protected as fully and effectually as property acquired by purchase. And so we think that a gift of a chose in action, provided no claims of creditors interfere to affect its validity, ought to stand on the same footing as a sale."¹ To the contention that the donee could not maintain the action in the name of the donor's administrator, the court said: "But if an equitable assignment is sufficient to complete the gift, it follows that the administrator is a trustee, and cannot set up his legal right in order to defeat the trust."² This decision has been followed in that State, both with respect to gifts *inter vivos* and *mortis causa*.³ The same rule of decision holds good

¹ Grover v. Grover, 24 Pick. 261; S. C. 35 Am. Dec. 319.

² The court, besides the English authorities, relied upon Wright v. Wright, 1 Cow. 598, which is not, as we shall see, a sound authority; but it contained a dictum which supported the court's conclusion.

³ Sessions v. Moseley, 4 Cush. 87; Bates v. Kempton, 7 Gray, 382.

in Maine,¹ in Kentucky,² in Georgia,³ in California,⁴ in Alabama,⁵ in Virginia,⁶ in Michigan,⁷ in South Carolina,⁸ in North Carolina,⁹ in Connecticut,¹⁰ in New York,¹¹ in Pennsylvania,¹² in Tennessee,¹³ in Canada,¹⁴ in New Jersey,¹⁵ in Minnesota,¹⁶ in New Hampshire,¹⁷ in Indiana,¹⁸ in the Federal courts,¹⁹ and in West Virginia,²⁰ but, not possibly, in Ireland.²¹

¹ *Borneman v. Sidlinger*, 15 Me. 429 (a note and mortgage); *Wing v. Merchant*, 57 Me. 383; *Trowbridge v. Holden*, 58 Me. 117; *Parker v. Marston*, 27 Me. 196.

² *Stephenson v. King*, 81 Ky. 425; *Ashbrook v. Ryon*, 2 Bush. 228; *Southerland v. Southerland*, 5 Bush. 591; *Turpin v. Thompson*, 2 Met. 420.

³ *Hill v. Sheibley*, 64 Geo. 529.

⁴ *Druke v. Heiken*, 61 Cal. 346; S. C. 44 Am. Rep. 553.

⁵ *Jones v. Deyer*, 16 Ala. 221; *Walker v. Crews*, 73 Ala. 412 (citing *Borum v. King*, 37 Ala. 606).

⁶ *Elam v. Keen*, 4 Leigh, 333.

⁷ *Ellis v. Secor*, 31 Mich. 185.

⁸ *Trenholm v. Morgan*, 28 S. C. 268.

⁹ *Kiff v. Weaver*, 94 N. C. 274; S. C. 34 Alb. L. Jr. 11, distinguishing *Overton v. Sawyer*, 7 Jones (N. C.) L. 6; *Fairly v. M'Lean*, 11 Ired. (N. C.) L. 158; and *Brickhouse v. Brickhouse*, 11 Ired. (N. C.) L. 404, which were actions at law.

¹⁰ *Brown v. Brown*, 18 Conn. 410; S. C. 46 Am. Dec. 328; *Camp's Appeal*, 36 Conn. 88.

¹¹ *Wright v. Wright*, 1 Cow. 598; *Contant v. Schuyler*, 1 Paige, 316; *Stevens v. Stevens*, 5 T. & C. 87; *House v. Grant*, 4 Lans. 296; *Westerlo v. DeWitt*, 36 N. Y. 340; S. C. 2 Trans. App. 332; 93 Am. Dec. 517; *Bedell v. Corll*, 33 N. Y. 581; *Walsh v. Sexton*, 55 Barb. 251 (U. S. bonds in a box); *Gray v. Barton*, 55 N. Y. 68; *Taber v. Willetts*, 44 Hun, 346; S. C. 8 N. Y. St. Repr. 825; *Montgomery v. Miller*, 3 Redf. 154; affirmed 78 N. Y. 282; *Stevens v. Stevens*, 2 Hun, 470; *Kurtz v. Smither*, 1 Dem. 399 (bank certificate of deposit); *Grangiac v. Arden*, 10 Johns. 293 (a lottery ticket); *Johnson v. Spies*, 5 Hun, 468.

¹² *Gourley v. Linsenbigler*, 51 Pa. St. 345; *Wells v. Tucker*, 3 Binn. 366.

¹³ *Richardson v. Adams*, 10 Yerg. 273; *Donnell v. Donnell*, 1 Head. 267.

¹⁴ *Purdham v. Murray*, 9 Ont. App. 369, reversing 29 Grant. Ch. 443.

¹⁵ *Egerton v. Egerton*, 17 N. J. Eq. 419; *Corle v. Monkhouse*, 25 Atl. Rep. 157.

¹⁶ *Tullis v. Fridley*, 9 Minn. 79; *Stewart v. Hidden*, 13 Minn. 43.

¹⁷ *Keniston v. Sceva*, 54 N. H. 24; *Abbott v. Tenney*, 18 N. H. 109.

¹⁸ *White v. Callinan*, 19 Ind. 43.

¹⁹ *Chaney v. Basket*, 6 Repr. 769; S. C. *sub nomine*, *Hassell v. Basket*, 8 Biss. 303; affirmed 107 U. S. 602; S. C. 108 U. S. 267.

²⁰ *Martin v. Smith*, 25 W. Va. 579.

²¹ *Lee v. Magrath*, 10 Ir. Rep. (1882) pp. 45, 313. In Louisiana a *donatio inter*

272. SEALED NOTE.—In some States, where the old distinction between sealed and unsealed instruments is kept up, the donor's own sealed note, given by the donor to the donee is a valid gift, and it may be enforced against his estate after his death. "A voluntary bond," said Chief Justice Gibson, "is both in equity and in law, a gift of the money."¹ "It is not now to be doubted," said Justice Bell, "that though a parol unexecuted promise to make a gift *inter vivos* without consideration is void, an agreement under seal to do so may be enforced as a legal obligation."² These cases were followed in the case of a sealed note,³ so also in the case of a mortgage under seal.⁴ So where seals are presumptive evidence of a consideration, such presumption is not overcome by proof that a valuable consideration was not paid.⁵

273. ALL UNASSIGNED INSTRUMENTS THE SUBJECT OF GIFT.—It may be stated that any written obligation is the subject of gift, without indorsement or assignment. Illustrations have already been given of notes, bonds, and mortgages. But the cases do not stop here; and it is said that "All evidence of indebtedness which may be regarded as representing the debt, whether with or without indorsement, are the subject of a *donatio mortis causa*,"⁶

vivos of a note must be proved before a notary public and two witnesses to make the gift valid: Succession of De Pouilly, 22 La. Ann. 97. This is by reason of the provisions of the code.

¹ *Sherk v. Endress*, 3 W. & S. 255; *Ross's Appeal*, 127 Pa. St. 4.

² *Yard v. Patton*, 13 Pa. St. 278, 285.

³ *Mack's Appeal*, 68 Pa. St. 231; *In re Estate of Cowen*, 3 Pitts. 471.

⁴ *Stoy v. Stoy*, 41 N. J. Eq. 370; *Aller v. Aller*, 40 N. J. L. 446.

⁵ *Van Amburgh v. Kramer*, 16 Hun, 205; *Anthony v. Harrison*, 14 Hun, 198, affirmed 74 N. Y. 613, without an opinion.

⁶ *Kiff v. Weaver*, 94 N. C. 274.

and of course of *inter vivos*.¹ Even a gift of an unassigned I. O. U. is valid.²

274. GIFT OF NOTE CARRIES MORTGAGE—GIFT OF MORTGAGE DOES NOT CARRY NOTE.—A valid gift of a note secured by mortgage carries with it the mortgage, though such mortgage was never delivered nor assigned to the donee, and even though the note was unassigned by the donor, the payee.³ But a delivery of the mortgage, although duly assigned, without a delivery of the note, does not make a valid gift of the note, and the mortgage cannot be enforced.⁴ Yet where a father gave his son a mortgage he held against him, on his death-bed, saying, "Take this, but do not wrong your children, and do not mortgage your property," the gift was held to be a good *causa mortis* to the son alone, although the son had already mortgaged the estate, of which the father was not aware.⁵

275. DRAFT OR BILL OF EXCHANGE.—A bill of exchange in favor of the donor, is the subject of a gift,

¹ *Brown v. Brown*, 18 Conn. 410; S. C. 46 Am. Dec. 328; *Westerlo v. De Witt*, 36 N. Y. 340; S. C. 93 Am. Dec. 517; 2 Trans. App. 332 (a certificate of deposit); *Basket v. Hassell*, 107 U. S. 602; S. C. 27 Alb. L. Jr. 367; 108 U. S. 267; 48 Am. Rep. 506; affirming 8 Biss. 303 and 6 Repr. 769 (a certificate of deposit); *Hopkins v. Manchester*, 16 R. I. 663; *Moore v. Moore*, L. R. 18 Eq. 474; S. C. 43 E. J. Ch. 617; 22 W. R. 729; 30 L. J. (N. S.) 352; 10 Moak. 788; *Beardslee v. Reeves*, 76 Mich. 661; *Annis v. Witt*, 33 Beavan, 619 (a banker's deposit note); *Harris v. Clark*, 2 Barb. 94; S. C. 3 Comst. 93; *Cornell v. Cornell*, 12 Hun, 312.

² *Hewitt v. Kaye*, L. R. 6 Eq. Cas. 198; S. C. 37 L. J. Ch. 470; 15 W. R. 835; *Gason v. Rich*, 19 L. R. Irish, 391.

³ *Druke v. Heiken*, 61 Cal. 346; *Kiff v. Weaver*, 94 N. C. 274; *Borneman v. Sidlinger*, 15 Me. 429; S. C. 21 Me. 185; see *Hackney v. Vrooman*, 62 Barb. 650; *Brown v. Brown*, 18 Conn. 410; *Hassell v. Tynte*, Ambl. 318; *Duffield v. Hicks*, 1 Dow N. S. 1; 1 Bligh. N. S. 497.

⁴ *Wilson v. Carpenter*, 17 Wis. 512; *McHugh v. O'Connor*, 91 Ala. 243.

⁵ *Merideth v. Watson*, 17 Jur. 1063. It should be observed that this was a forgiveness of the debt, and not an actual gift of the mortgage. If the transaction falls short of a gift, the taking of a new mortgage in place of the old, to correct an error in the latter, is not sufficient to turn the transaction into a gift: *Oldenberg v. Miller*, 82 Mich. 650.

although such donor dies before it falls due, even though it be not indorsed by the donor.¹ So a draft drawn by the donor in favor of the donee is valid, if presented and accepted before the death of the donor ; but it is not a good gift if not presented and accepted before the donor's death.² But if presented and the drawee declined to accept it until after he has ascertained whether the signature was genuine, he being in actual doubt on that question, the gift is still good, and if the estate receive the fund upon which it is drawn, it may be enforced against such estate.³

276. GIFT OF PART OF NOTE.—There is no doubt that the owner of a note may make a gift of a part of the note, the chief trouble lying in the question of delivery. If words of gift were used, and an actual delivery made, then the gift of the part given would be valid ; so we apprehend that if the note was actually delivered by hand and then received back by the donor to hold for the benefit of the donee and for himself, the gift would be a good one. So, too, if the donor by an instrument in writing, signed by himself, declare a gift of a part of the note to be given to the donee, and deliver this written statement to such donee, he would, no doubt, constitute himself a trustee, and the gift of such part would be valid.⁴ But if he were merely to declare to the donee that he gave him a part of the note, and did not deliver it, the gift would not be valid, we are inclined to think ; although, as we have seen elsewhere, if a husband take a note payable to himself and wife, that is a valid gift to

¹ *Austin v. Mead*, L. R. 15 Ch. Div. 651 ; S. C. 50 L. J. Ch. 30 ; 43 L. T. 117 ; 28 W. R. 891 ; *Rankin v. Weguelin*, 27 Beav. 309 ; S. C. 29 L. J. Ch. 323, note.

² *Harris v. Clark*, 3 N. Y. 93 ; affirming 2 Barb. 94.

³ *Bromley v. Brunton*, L. R. 6 Eq. 275 ; S. C. 37 L. J. Ch. 902 ; 16 W. R. 1006 ; 18 L. T. N. S. 628.

⁴ *Green v. Langdon*, 28 Mich. 221.

the wife, if she survive him, although no actual delivery was ever made to the wife, the circumstances dispensing with a delivery.¹ An English case somewhat bears on these conditions. There a testator, who held a banker's deposit for £2,700, in his last illness, two days before his death, expressed a wish to give £500, part of the amount, to his wife. At his request, a friend filled up a seven days' notice to the bank to withdraw the deposit, and the testator signed it. This friend then took the notice to the bank. Afterward the testator signed a form of cheque, which was on the back of the note, "Pay self or bearer £500." The note was then delivered to the wife; and before the expiration of the seven days' notice the testator died. The practice of the bank was, when a customer withdrew part of a sum which he had placed on deposit, to give him a fresh note for the remainder. The court adjudged that there was not a good *donatio mortis causa* of the £500, for the reason that the cheque was not payable until after his death. The court construed the effect of the notice to be to set free £2,700, and upon that fund the testator drew his cheque, and then died before the fund was set free. "Looking at the whole of the circumstances of the case, and at the practice of the bank, which was to give a fresh deposit note for the balance when a part of the money was withdrawn, it does not appear to me that the delivery of the note was made with the intention of giving either it or the money to the wife. The intention was to deliver the cheque, and according to the authorities, that is not a good *donatio mortis causa*."² If it cannot be determined with reasonable certainty the proportion given, the gift will be void.³ So a gift of a

¹ See Section 299. See *Carpenter v. Soule*, 88 N. Y. 251.

² *Austin v. Mead*, L. R. 15 Ch. Div. 651; S. C. 50 L. J. Ch. 30; 43 L. T. 117; 28 W. R. 891.

³ *Young v. Young*, 80 N. Y. 422.

note with a reservation of the interest accruing thereon for the life of the donor is void; because it is such a reservation of the control over the thing given as is incompatible with the validity of the gift.¹

277. MEMORANDUM.—So money already in the donee's hands may be given to him by the owner by the use of a memorandum evidencing its amount and identity, accompanied by an explicit declaration of the donor's intention.² But where a mother on her death-bed handed to her daughter a written but unsigned memorandum, expressing her wishes concerning the disposition of certain bonds and other personalty to M., saying, "That is my will—that is what I want done;" and, again, pointing to a drawer, "There are the papers—I want you to take charge of them;" and this daughter, afterward, but in her mother's lifetime, did possess herself of a box in this drawer containing the bonds referred to in the memorandum; and this memorandum declared that the interest on these bonds was to be held for M. "to do as she pleases, but not the principal—that is to be held intact," it was adjudged that neither the property mentioned in the memorandum nor the bonds in the box could be sustained as a gift to M., for two reasons: First, because the memorandum could not be considered a will, it not being signed by the alleged donor; second, because the words of the alleged donor showed that she did not intend to deliver them *in presenti*, but intended that the daughter should take charge of them at her death.³ Where the donee had already possession of the fund given, and the donor gave him a receipt in full therefor, this was held to make it a valid

¹ Wirt's Estate, 5 Dem. (N. Y.) 179. The soundness of this case may well be doubted. See Section 202.

² Champney v. Blanchard, 39 N. Y. 111; Moore v. Darton, 7 E. L. & Eq. 134.

³ Trenholm v. Morgan, 28 S. C. 268.

gift.¹ But a memorandum of gift indorsed upon an undelivered note is not sufficient.²

278. NON-TRANSFERABLE INSTRUMENT.—An instrument evidencing a debt, which cannot be transferred by indorsement so as to give the assignee an action thereon, cannot be made the subject of a gift.³

279. BOOK ACCOUNT.—A receipt or other written evidence, delivered to the donee, may be sufficient to show a gift. And even weaker evidence than this has upheld a gift. Thus, where husband transferred to his wife upon his books, a book account, it was held that there was a good gift of the book account.⁴ But in this case the gift was from a husband to his wife, to replace money he had received from her by reason of his marital rights; and this had much to do with the decision.⁵

280. GIFT OF RECEIPT FOR THE INSTRUMENT GIVEN.—The question has arisen whether the delivery of a receipt for a note is a sufficient gift of the note. And it may be remarked that little or no difference exists in the validity of a gift, by a delivery of a receipt for it, whether the subject of the gift is a note or tangible personal property, as a chattel. In Virginia the case was met and decided in 1833. There the donor held his attorney's receipt for a bond. He told the donee he could have the bond, and delivered to him the receipt. At the time of such delivery the bond was not with the donor nor near him. This was held to be a valid gift, the same as the delivery of a key

¹ *Champney v. Blanchard*, 39 N. Y. 111.

² *Tiffany v. Clarke*, 6 Gr. Ch. (Can.) 474.

³ *Ex parte Gerow*, 10 N. B. 512.

⁴ *Kerr v. Read*, 23 Gr. Ch. 525. See *Champney v. Blanchard*, 39 N. Y. 111.

⁵ See *George v. Howard*, 7 Price, 646. *Neufville v. Thomson*, 3 Edw. Ch. 92. See Section 156.

to a trunk had been held a valid gift of the contents of the trunk. "Speaking from my own experience," said Carr, J., "I should say an attorney requires no better order for the payment of money he has collected on a bond than the receipt he has given for the bond; when he takes this in, with a receipt upon it for the money, he feels himself safe." In this case the receipt was not assigned to the donee, nor was there any order written upon it or accompanying it directing the receiptor to deliver the bond or pay its contents to the donee.¹

281. POLICY OF INSURANCE.—A policy of life insurance, payable to his estate at his death, may be made the subject of a gift *inter vivos* or *mortis causa*.² Thus, where an insured person made a voluntary deed of an assignment of a policy of insurance upon his own life to trustees upon trust for the benefit of his sister; and the deed was delivered to the trustees, but the donor kept the policy, no notice of the assignment being given to the insurance company; and he afterward, for a valuable consideration, surrendered the policy to the company, it was held that the trustees could compel the donor to give to them security to the amount of the value of the policy to secure the payment of an amount equal thereto at his death.³ A

¹ *Elam v. Keen*, 4 Leigh, 333. Where the donor indorsed a receipt for bonds on deposit requesting the cashier to "let" the donee "have the amount of the within bill," it was held to be a good gift of the proceeds of the bond: *Crook v. First Nat. Bank*, 52 N. W. Rep. 1131.

² *Amis v. Witt*, 33 Beav. 619; S. C. 1 B. & S. 109; 7 Jur. (N. S.) 499; 30 L. J. Q. B. 318; 9 W. R. 691; 4 L. T. N. S. 283; *Hayes v. Alliance, etc., Ins. Co.*, L. R. 8 Ir. 149 (1881).

³ *Forsesque v. Barnett*, 3 Myl. & K. 36; *Catholic Knights of America v. Morrison*, 16 R. I. 468. See *Johnson v. Ball*, 5 De G. & Sm. 85; S. C. 21 L. J. N. S. Ch. 210; 16 Jur. 538; *Searle v. Law*, 15 Sim. 95; S. C. 15 L. J. Ch. N. S. 189; 10 Jur. 191. A gift of a policy of insurance, unassigned, was upheld in a case at law, on the ground that the gift of the policy itself was good, regardless of who might be entitled to the money due upon it: *Rummens v. Hare*, 1 Ex. Div. 169; S. C. 46 L. J. Ex. 30; 34 L. T. 407; 24 W. R. 385. But where the policy was

father effected a policy of insurance on his own life in his daughter's name, and paid the premiums himself, but did not deliver the policy to her ; yet this was held to be a valid gift.¹

282. GIFT OF BOND OR NOTE MERGED IN A JUDGMENT—GIFT OF JUDGMENT.—A note, bond, or other evidence of debt, upon which a judgment has been rendered, cannot be made the subject of a gift. The gift of the instrument does not operate as an equitable assignment of the judgment. So the gift of a judgment cannot be made without an actual assignment of it, or by the execution and delivery of a deed of assignment thereof. There is no other way in which a judgment can be given.²

283. STATUTORY REGULATIONS EFFECTING TRANSFERS.—Occasionally a gift, in all other respects perfect, must fail because some positive statute touching the transfer of the thing given has not been complied with. Phases of this question have been referred to under the head of gift of stock, and these cases are strictly analogous to those now given, and the principle governing the gift of such stock is applicable here. We can illustrate this part of the discussion by a case of turnpike bonds. One Law made a voluntary assignment of turnpike bonds, and delivered them, but no transfer of them was made upon the books of the turnpike company. By statute, in order to make a transfer of such bonds effectual, the assignment must have been indorsed or written under or annexed to the

unassigned, and afterward devised by will, it was held that the donee took under the will, and not as a donee of a gift *inter vivos*. *Howes v. Prudential Assurance Co.*, 49 L. T. N. S. 133. In this case the wife paid the premiums out of her own separate estate, from the date of the delivery of the policy.

¹ *Weston v. Richardson*, 47 L. T. N. S. 514 ; *Crittenden v. Phoenix, etc., Ins. Co.*, 41 Mich. 442.

² *Patterson v. Williams*, Ll. & G. 95 (Irish).

bonds, and signed in the presence of, and attested by one or more credible witnesses; and the transfer was to be produced and notified to the clerk or treasurer¹ of the trustees or commissioners of the road, within two calendar months next after the date thereof, who were to enter the same in a book to be kept for that purpose, and such transfer was *then to entitle* the assignee to the full benefit of the securities. In this particular instance this transfer was not made, and the gift was held to be incomplete. The court said that if the donor had declared in writing that he would hold the securities in trust for the donee, that declaration would have been binding upon him and his personal representatives; but instead of doing this, he attempted to assign them, and there was a complete failure in this respect.²

284. NOTE GIVEN TO EQUALIZE DISTRIBUTION OF AN ESTATE—LEGACY DUTY.—It is a device resorted to occasionally that a testator will give his note to a child, in order to give it an equal distribution of his estate. Such a note, however good the intentions of the donor were, cannot be enforced against his estate.³ Such a note given for the purpose of avoiding the legacy duty is equally insufficient.⁴

285. CHECK OPERATES AS AN EQUITABLE ASSIGNMENT OF A SPECIAL DEPOSIT.—The actual delivery of a certificate of special deposit may be dispensed with if a check

¹ Such is the language of the report, and evidently of the statute.

² *Searle v. Law*, 15 Sim. 95; S. C. 15 L. J. Ch. N. S. 189; 10 Jur. 191. For a declaration of trust see *Collinson v. Patrick*, 2 Keen, 123; S. C. 7 L. J. Ch. N. S. 83; *Howes v. Prudential Assurance Co.*, 49 L. T. N. S. 133.

³ *Parish v. Stone*, 14 Pick. 193; S. C. 25 Am. Dec. 378 (*contra*, *Bowers v. Hurd*, 10 Mass. 427); *West v. Cavins*, 74 Ind. 265 (criticising *Mallett v. Page*, 8 Ind. 364).

⁴ *Holliday v. Atkinson*, 5 Barn. & C. 501; S. C. 8 Dowl. & Ryl. 163.

be given upon the bank for the exact amount (or perhaps a part of it) described in the certificate, and specifying that it is for the amount therein described. Thus a donor had in bank a special deposit, and two hours before his death signed a check directed to the bank, properly dated, drawn as follows: "Pay to the order of R. K. the amount of deposit, and charge to my account." No amount was designated, and the donor had no sum of money in the bank except that on special deposit. He delivered the check to the donee with proper words of gift. At the time of the gift the certificate of deposit was in the store of the donee, where the donor had been a clerk, in a drawer. The gift was deemed valid, upon the ground that the check operated as an equitable assignment of the certificate, and consequently an assignment of the fund.¹

286. **PERSONAL REPRESENTATIVE COLLECTING PROCEEDS OF NOTE GIVEN.**—If the personal representative of the donor collects the proceeds of a note that has been the subject of a valid gift, the donee may maintain a cause of action against the estate for the amount collected.²

287. **TO WHOM PAYMENT MADE.**—If the gift or an obligation is valid, the obligor must pay the money due thereon to the donee; and if he pay it to the donor he will be liable to the donee for the amount paid.³

288. **DONOR'S LIABILITY ON HIS INDORSEMENT.**—Suppose a note is payable to the donor or order, and he, desiring to make a gift of it to the donee, indorse it to him. This is a valid gift. But suppose, farther, that the maker of the note fails to pay it; can it be collected from the do-

¹ *Kurtz v. Smither*, 1 Dem. (N. Y.) 399.

² *Westerle v. De Witt*, 36 N. Y. 340; S. C. 2 Trans. App. 332; 93 Am. Dec. 517.

³ *Roberts v. Lloyd*, 2 Beav. 376.

nor? We are inclined to the opinion that it cannot be. Thus to a declaration on a bill of exchange, by an indorsee against the indorser, the defendant pleaded that he indorsed the bill to the plaintiff without having received any value or consideration whatsoever for or in respect for the indorsement, and that he had not at any time had or received any value or consideration whatsoever for or in respect of such indorsement; and this plea was adjudged sufficient after verdict.¹ So in Maine it was decided that the donor's estate was not liable on his indorsement, even under a claim to equalize the distribution of his estate.² But could a second indorsee for value recover from the first indorsee and from his indorser? Undoubtedly he could from his immediate indorser, or the first indorsee; and could also from the first indorser or donor, if he had no notice of a want of consideration for the first indorsement at the time he took it, before due, for value. If the donor be compelled to pay the last indorsee, he could recover from the donee the amount he pays.

289. GIFT OF EXPECTANCY.—It has been held that a gift of an expectancy in money held by trustees was void. This was in an instance where a testator bequeathed a sum of money to trustees in trust for his daughter for life, and, in case she died without leaving issue, for her next of kin, exclusive of her husband. During the lifetime of the daughter, her mother, as presumptive next of kin, by a voluntary deed assigned her expectant interest in reversion to the husband. It was decided that on the death of the daughter, without leaving issue, the assign-

¹ *Easton v. Pratchett*, 2 Cr. M. & R. 542; S. C. 5 Tyrwh. 1129. In Tyrwhitt's report, however, it is said by Denman, C. J., that "there is no doubt that the plea would have been bad on special demurrer, but after the verdict it must be taken that there is no consideration binding in law." The same case reported at length before it was affirmed as above reported in 1 Cr. M. & R. 798.

² *Weston v. Hight*, 17 Me. 237.

ment operated only as an agreement to assign, and, consequently, being voluntary, a court of equity would not enforce it.¹

290. CONSIDERATION FOR THE NOTE GIVEN—INADEQUACY OF CONSIDERATION.—Whenever there is a consideration for the note given by the alleged donor to the donee, the transaction ceases to be one of gift, but one of contract. The inadequacy of the consideration is immaterial. Thus, where an old man executed his note in the sum of \$10,000 in consideration that the payee would name his newly-born son after the maker, and the father gave the child the maker's name, in pursuance of which he gave him the note, as promised, this was held to raise a sufficient consideration to sustain the note. Speaking of the adequacy of the consideration, the court said: "No person in the world other than the promisor can estimate the value of an act which arouses his gratitude, gratifies his ambition, or pleases his fancy. If there be any consideration at all, it must be allotted the value the parties have placed upon it, or a conjectural estimate, made arbitrarily and without the semblance of a guide, must be substituted by the courts."² "Mere inadequacy in value of the thing bought or paid for," said another court, "is never intended by the legal expression want or failure of consideration. This only covers either total worthlessness to all parties or subsequent destruction, partial or complete."³

¹ *Meek v. Kettlewell*, 1 Ph. 342; S. C. 1 Hare, 464; 13 L. J. N. S. Ch. 28; 11 L. J. N. S. Ch. 293, 464; 7 Jur. 1120; 6 Jur. 550. It may be here noted that a voluntary assignment by deed of an equitable reversionary interest in personal property is valid: *Voyle v. Hughes*, 2 Sm. & G. 18; S. C. 18 Jur. 341; 23 L. J. Ch. 238. The deed must be delivered: *Re Way*, 10 Jur. N. S. 836; 34 L. J. Ch. 49; 13 W. R. 149.

² *Wolford v. Powers*, 85 Ind. 294.

³ *Cowee v. Cornell*, 75 N. Y. 91; S. C. 31 Am. Rep. 423. Other cases are cited

291. DESIRE OR INTENTION TO MAKE A GIFT NOT SUFFICIENT.—A mere desire or intention to make a gift of a chose in action can never be taken for the act itself. Thus, where an alleged donor told the person who had the possession of his notes that he desired \$500 of the notes, or \$500 of the money when collected upon them, to be paid over to the claimant, who had been for many years a member of his family, but neither the proceeds nor the notes were either assigned or delivered to her until after his death, the transaction was adjudged not to be a gift.¹ Bonds payable to bearer were purchased by an alleged donor and were kept by him up to the time of his death. He cut off and collected the coupons attached to them as they fell due, except those falling due during six months prior to his death. At the time he purchased the bonds, he said that he wanted them for the donee, and afterward he directed his banker, who negotiated the purchase, to have them registered in the donee's name. The banker took the bonds to the office of the company issuing them, and the name of the donee was indorsed upon each bond with the date of the indorsement and the name of the transfer agent. It was not shown that the donee had any knowledge of the transaction, nor was the effect of the registration shown. It was held that there was no gift because there was no delivery of the bonds.² Even a refusal to receive the money due on a debt owed by the donee to the donor, accompanied by declarations of the donor that he never intended to collect it, is not such a transaction as will amount to a gift.³

in *Wolford v. Powers*, *supra*, making an excellent collection on this point. See *Lindell v. Rokes*, 60 Mo. 249; S. C. 21 Am. Rep. 395; *Parks v. Francis*, 50 Vt. 626; 28 Amer. Rep. 517; *Worth v. Case*, 42 N. Y. 362; affirming 2 Lans. 264.

¹ Appeal of Fross, 105 Pa. St. 258; *Gason v. Rich*, 19 L. R. Irish, 391.

² Estate of Crawford, 113 N. Y. 560; *Hooper v. Goodwin*, 1 Swan, 485; S. C. 1 Wils. 212.

³ *McGuire v. Adams*, 8 Pa. St. 286; *Campbell's Estate*, 7 Pa. St. 100.

292. DELIVERY ESSENTIAL TO VALIDITY OF GIFT.—

In all cases of a gift of a written chose in action, delivery is as essential to the validity of the gift as the delivery of a chattel. The same rules applicable to a delivery of a chattel are applicable to a delivery of such chose in action.¹ This is very well illustrated by a case in New York. There a wife owned two notes, the larger one of which was, at the time of her death, held by H., with her consent, as collateral security for money loaned to her husband; the smaller one being in a bureau in the dwelling-house. A day or two before her death several persons heard her say to her husband, "You may have the money" or "all the money." Although these notes were not "money," yet the court decided that, as it did not appear that she had any money or property except the notes, she must have intended to convey them by the use of that term, and that the gift of the larger note was invalid, no delivery being shown and the note being in the hands of a third person as her property; but the gift of the smaller note was valid, for it was in a bureau in the donor's house and presumptively accessible to him.² The delivery may be to a third person for the donee.³

293. REDELIVERY OF NOTE.—The effect of a redelivery to the donor of the note given, is the same as a redelivery of a chattel given; and, perhaps, no stronger presumption against the validity of the claim that there was a gift is raised in the one case than in the other. If the gift is a *donatio mortis causa*, a resumption of possession by the donor is a revocation of the gift; and perhaps this is true, even though the donor take back the thing given at the

¹ Hatton v. Jones, 78 Ind. 466.

² Stevens v. Stevens, 2 Hun, 470.

³ Jones v. Deyer, 16 Ala. 221; Gammon Theological Seminary v. Robbins, 128 Ind. 85.

request of the donee, for a particular purpose, and agrees to act as his agent, but in the case of a gift *inter vivos*, a repossession by the donor does not annul the gift.¹ So where a note given as a gift *inter vivos* was redelivered to the donor by the donee under an arrangement that the former might collect thereon such an amount as he might need for his support in case he became poor, the gift was upheld.²

294. GIFT BY DEED.—A gift of a chose in action may be made by a deed, duly signed, sealed, and delivered, and in such an instance a delivery of the instrument given is not necessary to the validity of the gift. In this way a debt may be forgiven, though the donor and creditor retain possession of the instrument evidencing the debt.³ In one instance the Court of Chancery, in the administration of assets, enforced against the estate voluntary assignments, made by the testator, of annuities, mortgage debts, and policies of assurance, of which assignments no notice had been given in his lifetime to the mortgagors or grantors, such assignments containing covenants for further assurance by the testator, his executors and administrators.⁴ But it has been held that neither a voluntary assignment by deed of a mortgage debt, accompanied by a grant, not specifying the particular estate, but of all estates held in mortgage, and by a covenant for further assurance, and without delivery of the mortgage deed or notice to the mortgagor, nor the voluntary assignment of a policy of assurance retained in the hands of the assignor, and without notice given to the grantor, though accompanied by a

¹ *Grover v. Grover*, 24 Pick. 261; *Curtiss v. Barrus*, 38 Hun, 165.

² *Marston v. Marston*, 64 N. H. 146.

³ *Blakely v. Brady*, 2 Dr. & Wal. 311; *Gannon v. White*, 2 Ir. Eq. R. 207; *Fortesque v. Barnett*, 3 Myl. & K. 36; 2 L. J. Ch. N. S. 106.

⁴ *Cox v. Barnard*, 8 Hare, 310.

covenant for further assurance, can be considered as a complete and effectual assignment to be acted upon and enforced by the assignee without any further or other act to be done by the assignor.¹ The owner of certain funds, standing in his name on the books of a bank, by letter directed the bank to carry a part of the funds to the account of certain persons as trustees for his wife, and after her decease, for his son, and other parts thereof to the account of certain persons as trustees for his son, and such sums were accordingly carried over by the bankers to the account of such persons in their books, and the dividends were, from time to time, carried to the same accounts; but the testator never communicated the facts to the trustees, and there was some evidence that the testator had directed the transfer under an impression that he should be able, by that means, to evade the legacy duty, and that he had shown an intention to exercise some acts of ownership over the funds; the court declared the gifts void, and that the testator might at any time have revoked them.² But where A by a voluntary deed assigned to B all her personal estate, and appointed him her attorney to recover, receive, and give receipts for it, it was held that after her death that two promissory notes, one payable to A and the other to A or her order, passed to the donee.³

295. PRODUCTION OF NOTE, EFFECT UPON PRESUMPTION OF OWNERSHIP.—Where the code required an action to be brought in the name of the real party in interest, it was held that the possession of an unindorsed negotiable note *payable to bearer* raised a presumption that the person

¹ Ward v. Audland, 8 Beav. 201; S. C. 14 L. J. N. S. Ch. 145; 9 Jur. 384.

² Gaskell v. Gaskell, 2 Y. & J. 502.

³ Richardson v. Richardson, 3 L. R. Eq. 686; 36 L. J. Ch. 653. In Mississippi in 1866 a gift of a book account could only be made, after it was due, except by a release under seal: Young v. Power, 41 Miss. 197. So in 1847 in Pennsylvania: Campbell's Estate, 7 Pa. St. 100.

producing it at the trial was the real and rightful owner.¹ So the possession of a promissory note, indorsed in blank by the payee, is *prima facie* proof of ownership in the holder, even though the validity of the gift of the note is in controversy.² But where the action was brought by the administrator against the donee because of the alleged conversion of United States bonds belonging to the decedent; and the donee, as defendant, in her answer admitted the allegations with reference to the ownership of the bonds in the lifetime of the alleged donor, but averred that prior to his decease and shortly before his death that he gave them to her as a *donatio mortis causa*, and that she then "took possession thereof and kept the same continuously in her possession until and after the death of the said intestate, and that they have ever since remained in her possession and are now her property, and have never formed any part of the estate whereof the said intestate died possessed," it was held that the burden rested upon her to prove the validity of the gift, although title to the bonds passed by mere delivery. "This state of the pleadings," said the court, "devolved upon the defendant the burden of establishing the alleged gift. Such gifts are not presumed. '*Nemo donare facile presumitur*' is a maxim of the law applicable to the case, and where a gift *causa mortis* is alleged, the presumption being against it, clear proof on the part of the claimant is required. . . . The plaintiff was entitled to stand upon the admission of the answer that the intestate was the owner of the bonds in his lifetime. That gave him a *prima facie* case, because the defendant herself admitted such ownership, and only asserted a right by virtue of the alleged gift. We

¹ Kiff v. Weaver, 94 N. C. 274.

² Bedell v. Carll, 33 N. Y. 581; Sheppard v. Earle, 25 Hun, 317; Dean v. Corbett, 51 N. Y. Supr. Ct., p. 107.

think it was her duty to have proved the gift, otherwise the plaintiff would be entitled to recover.”¹ So in Georgia the delivery of a non-negotiable note, without more, is not sufficient to prove a gift.² If the donee maintained a close relationship to the donor, as wife to a husband, or administrator or executor to a decedent’s estate,³ or a household servant to a master, the presumption of a gift is not raised by a mere production of the note or instrument alleged to have been given.⁴ This is particularly true if the person claiming to be donee had access to the alleged donor’s papers.⁵

296. **FORGIVING DEBT.**—There is nothing to prevent a donor giving to the donee a debt the latter owes him ; or, in other words to forgive him his debt. This has been accomplished by delivery of a receipt for the part given where the whole debt was not given. Thus a father held a bond secured by mortgage executed by his son. With the intention of giving him a portion of the mortgage debt, the father executed and delivered to him a receipt therefor, containing a provision that the sum stated should be indorsed on the mortgage. It was contended that this was not a valid gift, in view of the fact that the indorsement was not made, but the court decided that it was, and operated to extinguish so much of the debt as was specified in the receipt, and that the agreement to indorse did not make it a mere executory promise, and that its performance was not essential to the gift. In this case there could be no delivery of the bond and mortgage ;

¹ Conklin v. Conklin, 20 Hun, 278 ; Drischler v. Van den Henden, 49 N. Y. Supr. Ct. 508 ; The Matter of O’Gara, 15 N. Y. St. Repr. 737.

² Hill v. Sheibley, 64 Geo. 529.

³ Cowee v. Cornell, 75 N. Y. 91 ; S. C. 31 Am. Rep. 428.

⁴ Estate of O’Gara, 15 N. Y. St. Repr. 737 ; Conklin v. Conklin, 20 Hun. 278.

⁵ Grey v. Grey, 47 N. Y. 552, reversing 2 Lans. 173 ; Love v. Dilley, 64 Md. 238 ; S. C. 1 East. Rep. 697 ; 6 Atl. Rep. 168.

because the entire amount therein named was not forgiven; for "the character of the gift," said the court, "dictates the manner of its delivery."¹ If the payee deliver to the maker his note as a forgiveness of the debt, the gift is a good one and binding.² A common method of making a gift is to cancel the evidence of it and deliver such evidence of the debt to the obligor; or, without cancellation, deliver to him such evidence, accompanied by a declaration that the gift is forgiven. There is no reason why such a gift is not as valid as a gift of a note of another by the donor to the donee. Thus it was said that a delivery up of mortgage deeds did not cancel the debt; but the delivery up of such deeds and of a bond, given at the time of the mortgage, for the purpose of releasing and acquitting the debt, in case the donor should not recover from his present illness, was an effectual *donatio mortis causa*; but the exact question was not decided.³ Where a wife borrowed money of her husband for the benefit of her separate estate, it was held that the husband could discharge the debt thus created, by destroying the evidence of the debt and declaring that he forgave it, intending thereby to give it to her.⁴ So where the holder of a due-bill, drawing interest, delivered it, when dangerously ill, to her servant, with an expression to the effect that she wished the debt to be cancelled; and ten days thereafter she died from such illness, it was held that there was a good *donatio mortis causa*, or a forgive-

¹ Carpenter v. Soule, 88 N. Y. 251; Lee v. Boak, 11 Gratt. 182.

² Stewart v. Hidden, 13 Minn. 43. For a case of gift of the debt to the debtor's wife see Hackney v. Vrooman, 62 Barb. 650. (But see Ward v. Turner, 2 Ves. Sr. 431, *arguendo contra*); Richards v. Syms, 2 Atk. 319; S. C. 3 Barn. 90; 2 Eq. Cas. Abr. 617; Young v. Power, 41 Miss. 197.

³ Hurst v. Beach, 5 Madd. 351; Campbell's Estate, 7 Pa. St. 100.

⁴ Gardner v. Gardner, 22 Wend, 526, reversing 7 Paige, 112, but not on this point; Darland v. Taylor, 52 Ia. 503; Blake v. Kearney, Manning (La.) 320.

ness of the debt.¹ So where a mortgagee delivered up the bond and mortgage securing its payment to the mortgagor, with the intention expressed of cancelling the debt, it was held to be a good gift.² But where a young woman, who had lived with her mother five years, and had never paid anything for her board, a little while before her death gave her mother a bond for £500, and a note for £100, which were debts owing to her from other persons; it was decreed that the bond and note was not a satisfaction of the board debt; for one debt cannot be a satisfaction of another debt.³ If the holder cancel a note and deliver it up, the transaction amounts to a forgiveness of the debt.⁴ A mortgagee wrote letters to the mortgagor, and persons interested under him, containing the expressions "I now give this gift, to become due at my death, unconnected with my will;" "I hereby request my executors to cancel the mortgage deed," etc.; "I again direct and promise that my executors shall comply with my former request, that is, to cancel all deeds and papers I may have chargeable on the R. estate." It was claimed that this constituted a gift or operated as a declaration of trust; but the court held that it did not.⁵ The taking back of a note or obligation, for payment of money by the alleged donor to the alleged donee raises a *prima facie* presumption of a loan, even as between a father and son; but that presumption may be rebutted by showing that the transaction was in fact a gift of the money passing between them; and even though the original transaction was a

¹ Moore v. Darton, 4 De G. & Sm. 517; S. C. 20 L. J. Ch. (N. S.) 626; 7 E. L. & Eq. 134.

² Richards v. Symes, 2 Atk. 319; S. C. Barns. Ch. 90 (1740).

³ Clavering v. Yorke, 2 Colly. 363.

⁴ Larkin v. Hardenbrook, 90 N. Y. 333; S. C. 43 Am. Rep. 176.

⁵ Scales v. Maude, 6 De G., M. & G. 43; S. C. 1 Jur. N. S. 1147; 25 L. J. Ch. 433.

loan, yet the conduct of the loaner may be such toward the donee as to show a forgiveness of the debt; in which event a court of chancery has full power to compel a cancellation of the obligation given. Transactions of this kind are not uncommon where the father desires to control the actions and conduct of his son.¹ Where a donor on his death-bed delivered a memorandum in the nature of a note, to A to deliver to the donee, the gift was upheld as a good *donatio causa mortis*.² But mere voluntary declarations indicating the intention of the creditor to forgive or release a debt, do not constitute a release in equity any more than they do at law.³ An indorsement, however, upon a security held by the donor of a forgiveness of a part of the debt is a good gift of that part without a delivery of the security to the donee, if he is informed of the gift and accepts it.⁴

297. RECEIPT FOR DEBT.—If the debt consists of an account, the holder of it may effectually give it to the debtor by delivering to him any evidence of the debt existing; and if there be none, then by a delivery of a receipt in full, or for the part given. So if the holder of the account write upon a copy of it that it is cancelled by a gift thereof to the debtor, and sign and deliver the same

¹ Flower v. Marten, 2 Myle & Cr. 459; Wekett v. Raby, 3 Bro. P. C. 16; Padmore v. Gunning, 7 Sim. 644.

² Moore v. Darton, 4 De G. & Smale, 517.

³ Cross v. Sprigg, 6 Hare, 552; S. C. 18 L. J. Ch. N. S. 204. See Aston v. Pye, 5 Ves. 350, note; Byrn v. Godfrey, 4 Ves. 6; Reeves v. Brymer, 6 Ves. 516. But see Eden v. Smyth, 5 Ves. 341, and Reeves v. Brymer, 6 Ves. 516, two doubtful cases. See, also, Cross v. Cross, 1 Ir. L. R. Ch. Div. 339; Nelson v. Cartmel, 6 Dana, 8; Young v. Power, 41 Miss. 197; Demmon v. McMahon, 37 Ind. 241.

⁴ Green v. Langdon, 28 Mich. 221. *Contra*, Gray v. Nelson, 77 Ia. 63. Although there was an indorsement on the bond of a forgiveness of a part of it: Tufnell v. Constable, 8 Sim. 69. Care should be observed in clearly distinguishing between a gift of a part of a note, and the acceptance of less than the amount due in payment. These transactions are not interchangeable: McKenzie v. Harrison, 120 N. Y. 260.

to the defendant with intent to make a gift thereof to him, and the latter accept it as a gift from him, the debt will be extinguished. Such is all the delivery the subject is capable of. But such a gift cannot be made by merely balancing the books of the debtor "by gift," making no delivery of anything to the debtor; because nothing would be delivered, and the books continuing in the possession of the creditor, the gift would not be executed. The giving of a receipt and the delivery operate as an assignment of the account and the right of action thereon, or so much thereof as the receipt covers, to the debtor.¹ So a stipulation and acknowledgment of the receipt of part payment of an existing debt, recited in an agreement under seal and delivered to the debtor, is proper evidence of an executed gift of the debt *pro tanto*.² So an indorsement made in consideration of kindness, by the direction and in the presence of the mortgagee, of part payments upon a mortgage against the donee, with the deliberate and express intention to make a gift or donation of his property to him, will be sustained as an extinguishment or forgiveness of the mortgage debt to that extent; and an actual delivery of the mortgage and note secured in such an instance is not necessary, although it would be if the whole debt were forgiven.³ The owner of certain land executed a contract for its sale and conveyance on the payment of \$1,100, to all which the purchaser agreed and accepted the contract. But it was never intended that the purchaser should pay anything, and subsequently the vendor indorsed upon the contract a receipt in full of the purchase-

¹ Gray v. Barton, 55 N. Y. 68; S. C. 14 Am. Rep. 181; Ferry v. Stephens, 5 Hun, 109; Green v. Langdon, 28 Mich. 221; Young v. Power, 41 Miss. 197; Carpenter v. Soule, 13 Wk. Dig. 55, affirmed 88 N. Y. 251.

² Lamprey v. Lamprey, 29 Minn. 151; Travis v. Travis, 8 Ontario, 516; S. C. 12 Ont. App. 438.

³ Green v. Langdon, 28 Mich. 221.

price, no money in fact being paid. Afterward the vendee brought an action to compel a specific performance of the written contract, and was successful. It was ruled that whatever may have been the intent, the agreement to convey was not voluntary, because it was for a valuable consideration ; that the contract did not operate as a gift of the land, and conclusively rebutted an intent to make a present gift ; that the facts showed that the vendor, to accomplish his purpose of giving the lands, gave the debt which represented his interest therein ; and that the receipt operated as a valid and complete gift of the debt, leaving the right of the vendee to a conveyance in force, the same as if the debt had been paid.¹

298. NOTE MADE PAYABLE TO THIRD PERSON.—A common form of gift is to take a note payable to a third person. In such an instance the maker of the note accepts as payee a stranger at the request of the person who is entitled to the proceeds ; and the latter waives his right to insist upon the receipt of such proceeds. This amounts to a gift from the person who is entitled to such proceeds, to the payee ; and the maker of the note, having once agreed to it, cannot insist upon the invalidity of the transaction.² Thus where a father conveyed land to his son, and took back a note payable to his remaining sons four years after his, the father's, death, but the interest thereon payable to himself during his life, this was adjudged a valid gift of the principal, and the gift was not void because of no actual delivery to the donees, which is usually essential,³ for the circumstances rendered it essential that the father should retain the note during his lifetime. The father be-

¹ *Ferry v. Stephens*, 66 N. Y. 321 ; S. C. below, 5 Hun, 109.

² *Carver v. Carver*, 53 Ind. 241 ; *Rinker v. Rinker*, 20 Ind. 185 ; *Towle v. Towle*, 114 Mass. 167.

³ *Jones v. Deyer*, 16 Ala. 221.

came a trustee for the donees in the custody of the instrument.¹ But if there can be a delivery, there must be one; or the gift will be invalid; and the mere fact that they are payable to the donee will not constitute the donor a trustee of them for the beneficiary.² If once delivered, the repossession of the note by the donor will not render the gift invalid. Thus where a mother sold her land and caused two of the notes, given for the purchase-money, to be made payable to her son, then three years old, and then delivered them to his father for safe keeping for the son; and the father afterward died, making the mother his executrix, and she, as such executrix, then obtained the custody of his papers, including the notes; and, in her individual name, purchased a tract of land of the maker of the notes, and in part payment therefor cancelled the notes and delivered them to him, it was held that the facts showed an executed gift of the notes, and that her conversion thereof to her own use was wrongful, and entitled the son, by his guardian, to recover from her the amount of the notes. And it was further held that if the mother committed a breach of trust in making the gift, she was estopped to question the title of her donee by setting up a breach of the trust in bar of his action for the amount of the note.³ So if a husband take a note payable to his wife instead of to himself, and deliver it to her, he cannot afterward claim the proceeds by the reason of the fact that it comes into his possession. Such a note is her separate property, and she is not a trustee for him.⁴ So a policy of insurance taken by a husband on his own life, payable to his wife, is a gift to her.⁵

¹ *Love v. Francis*, 63 Mich. 181.

² *Fanning v. Russell*, 94 Ill. 386.

³ *Rinker v. Rinker*, 20 Ind. 185.

⁴ *Carver v. Carver*, 53 Ind. 241. In Massachusetts all gifts made to a wife are void: *Towle v. Towle*, 114 Mass. 167.

⁵ *Fowlerly v. Butterly*, 78 N. Y. 68; S. C. 34 Am. Rep. 507.

299. NOTE PAYABLE TO HUSBAND AND WIFE OR TO TWO OR MORE PERSONS—DELIVERY—SURVIVORSHIP.—If a husband take a note payable to himself and wife, it is a gift as to her; and if she survive him before its collection, she is entitled to the full amount of it; but she has no interest in it until his death. During his life he may control it. A delivery to her is not essential. In such an event it may be shown that the husband gave her a legacy in lieu of the note.¹ She has no interest therein until his death; and if she die before him, he takes the whole by right of survivorship. He may even defeat her interest by his will.² In all such instances the sufficiency of the assets to pay the debts of the estate must be considered; and if there are not enough, her claim fails.³ A deposit made by the husband in the name of his wife and his own, and a certificate given therefor stands upon the same basis as a note so taken.⁴ Such a transaction amounts, *prima facie*, to a gift; but the presumption thus raised may be rebutted.⁵ So a transfer of money by a husband into the joint names of himself and wife, with intent to make it a gift, will so constitute it.⁶ But in determining whether the wife has an interest in the gift before her death, it is well to bear in mind the common-law rule with respect to a wife's personal estate and the right of

¹ *Sanford v. Sanford*, 45 N. Y. 723; *Sanford v. Sanford*, 2 T. & C. 641; affirmed 58 N. Y. 69; S. C. 17 Am. Rep. 206, but not upon the point here stated. Doubtful upon the question of delivery: *Matter of Ward*, 2 Redf. 251; S. C. 51 How. Pr. 316.

² *Pile v. Pile*, 6 Lea, 508; S. C. 40 Am. Rep. 50; *Scott v. Simes*, 10 Bosw. 314.

³ *Christ's Hospital v. Budgin*, 2 Vern. 683; S. C. Eq. Cas. Abr. 70, pl. 13; *Dummer v. Pitcher*, 5 Sim. 35; S. C. 2 Myl. & Keen. 262 (Stock.)

⁴ *Roman Catholic Orphan Asylum v. Strain*, 2 Bradf. 34; *Scott v. Simes*, 10 Bosw. 314 (a delivery to the wife held not necessary); *Prindle v. Caruthers*, 15 N. Y. 425.

⁵ *Pile v. Pile*, 6 Lea, 508; S. C. 40 Am. Rep. 50; *Johnson v. Lusk*, 1 Tenn. Ch. 3; *Johnson v. Lusk*, 6 Coldw. 113; *Draper v. Jackson*, 16 Mass. 480.

⁶ *Low v. Carter*, 1 Beav. 426; *Vance v. Vance*, 1 Beav. 605.

her husband thereto when he has reduced it to his possession. This rule has left its mark upon the cases holding survivorship in her necessary to the right of enjoyment.¹ Whether the usual married women's act has changed the rule has not been decided, it is believed; but it is the opinion of the writer that it has, and the transaction would be the same as if the wife was a stranger.²

300. NOTE OF DONOR PAYABLE TO DONEE.—At an early date it was declared that the note of the donor executed to the donee as a gift was not a valid gift; it was only a mere promise to pay a certain sum of money, and being without consideration, it could not be enforced. Such a note cannot be regarded as an appointment or disposition in the nature of a gift; and is not capable of any greater effect in equity than at law.³ "But we think," said the Supreme Court of Massachusetts, "that the donor's own promissory note payable to the donee, could not be the subject of such a donation. It was not an existing available promissory note to any one; it was not a chose in action. We have already seen that it was not a binding contract by the promisor to the promisee; and if it were, it would be open to another objection as a *donatio mortis causa*, namely, that it would not be revocable by the donor. It was simply a promise to pay money, and as such and as a gift of a sum of money, it wants the es-

¹ Johnson v. Lusk, 6 Coldw. 113; S. C. 1 Tenn. Ch. 3 below; Searing v. Searing, 9 Paige, 283; Thompson v. Ellsworth, 1 Barb. Ch. 624.

² For other English cases, see Gosling v. Gosling, 3 Drew. 335. A sum of money was invested in the funds in the joint names of husband and wife, and the wife by a power of attorney from the husband, sold out a portion and with his knowledge kept it locked up in her own special custody. It was held that the portion which remained in the funds in their joint names survived to her, but the other portion, which was sold out by her and kept in her custody, formed, on his death, a part of his personal estate: *Re Gadbury*, 11 W. R. 895; S. C. 32 L. J. Ch. 780.

³ Tate v. Hilbert, 2 Ves. Jr. 111; S. C. 4 Bro. Ch. 286.

sential requisite of an actual delivery."¹ Love and affection in such an instance will not support the note.² Thus, where a father gave his son his note as a gift, and afterward took up this note and gave him another for a larger amount, the last note was held void; and the claim that there was a good consideration for the second note, because of the first, was deemed not well taken.³ A note payable at his death, executed as a gift, cannot be enforced against his estate.⁴ So where a son, of full age, went to a distance, among strangers, fell sick, was cared for by them; and after he got well, his father gave a note for what those nursing and caring for him had done and for the money they had spent for him, it was held that the note could not be enforced.⁵ So where a donor, a short time before her death, gave her note to the plaintiff, who was a daughter of the intestate's husband by a former marriage; the plaintiff worked for her father for some time after her majority, but no contract was shown that she was to receive pay for her services; her father

¹ *Parish v. Stone*, 14 Pick. 198; *Bowers v. Hurd*, 10 Mass. 427; *Gammon Theological Seminary v. Robbins*, 128 Ind. 85; *Holliday v. Atkinson*, 5 B. & C. 501.

² *Smith v. Kittridge*, 21 Vt. 238; *Raymond v. Sellick*, 10 Conn. 480; *Brown v. Moore*, 3 Head. 670; *Walsh v. Kenedy*, 9 Phila. 178; S. C. 31 Leg. Int. 76; 2 W. N. Cas. 436; *Langdon v. Allen*, 1 W. N. Cas. 395; *Worth v. Case*, 42 N. Y. 362, affirming 2 Lans. 264; *Pearson v. Pearson*, 7 Johns. 26; *Fink v. Cox*, 18 Johns. 145; *Craig v. Craig*, 3 Barb. Ch. 76; *Whitaker v. Whitaker*, 52 N. Y. 386; S. C. 11 Am. Rep. 711; *Copp v. Sawyer*, 6 N. H. 386; *Phelps v. Phelps*, 28 Barb. 121; *Flint v. Pattee*, 33 N. H. 520; *Voorhees v. Combs*, 4 Vr. (N. J.) 494; *Hamor v. Moore*, 8 Ohio St. 239; *Starr v. Starr*, 9 Ohio St. 74; *Egerton v. Egerton*, 17 N. J. Eq. 419; *Taylor v. Staples*, 8 R. I. 170; *Bradley v. Hunt*, 5 Gill. & J. 54; *Blanchard v. Williamson*, 70 Ill. 647; *Brown v. Moore*, 3 Head. 671; *Smith v. Kittridge*, 21 Vt. 238; *House v. Grant*, 4 Lans. 296. Such a gift is not complete until the note is paid: *Williams v. Forbes*, 114 Ill. 167.

³ *Copp v. Sawyer*, 6 N. H. 386; *Hill v. Buckminister*, 5 Pick. 391.

⁴ *Hall v. Howard*, Rice L. (S. C.), 310; *Prior v. Reynolds*, 8 W. L. Jr. 325; *Flint v. Pattee*, 33 N. H. 520; *Sanborn v. Sanborn*, 65 N. H. 172.

⁵ *Mill v. Wyman*, 3 Pick. 207.

gave his homestead to the donor, and it was found as a fact that both he and the donor, at the time of the conveyance, intended, and the father so expressed himself, that the plaintiff should be paid for her services, and it was to carry out this purpose that the note was given; it was held, notwithstanding this, that the note was invalid, because it was a gift based on a promise not executed, there was no consideration for it, and it was not a declaration of a trust.¹ Nor does a prior gift constitute a legal consideration for such a note.² If, however, there was a consideration, as a promise to pay the donee for services to the donor as nurse in his illness, the note is valid; for then it becomes a contract, and is no longer a gift.³ But the payment of interest on such a note will not make the obligation binding.⁴

301. *LAWSON v. LAWSON*—GIFT FOR MOURNING.—The case of *Lawson v. Lawson*⁵ is one often referred to; and many efforts have been made to distinguish it from other cases. At this day, however, it is practically overruled. That was a *donatio mortis causa*. A husband gave his wife one hundred guineas, and drew a bill on his goldsmith to pay her £100 for mourning. There was no question that the first was a valid gift, and the court also held that the latter was a good appointment. "It might operate," observed the court, "like a direction given by the testator touching his funeral, which ought to be observed, though not in the will; that the court ought to go

¹ *Rogers v. Rogers*, 55 Vt. 73; *In re Cowen*, 3 Pitts. 471; *Smith v. Smith*, 3 Stew. (N. J.) 564.

² *In re Cornwall*, 6 Nat. Bank Ref. 305; *Copp v. Sawyer*, 6 N. H. 386.

³ *Worth v. Case*, 42 N. Y. 362; affirming 2 Lans. 264; *Earl v. Peck*, 64 N. Y. 596; *Cowee v. Cornell*, 75 N. Y. 91; S. C. 31 Am. Rep. 428; *Giddings v. Giddings*, 51 Vt. 227; S. C. 31 Am. Rep. 682.

⁴ *Phelps v. Phelps*, 28 Barb. 121.

⁵ 1 P. Wms. 441; S. C. 2 Eq. Cas. Abr. 575, pl. 4.

as far as it could to assist the meaning of the party in this case.”¹

302. NOTE OF DONOR PAYABLE TO DONEE IS VALID.—There are a few cases which hold that the donor's own note, payable to the donee, is valid, and a binding obligation, both as a gift *inter vivos* and as a *mortis causa*. One of the earliest cases was decided in New York in 1823. There the maker, in his last illness, signed a promissory note for \$500, and delivered it to the payee as a gift *mortis causa*. After the donor's death the donee brought an action upon the note against the executors of the maker. The defense attempted to show a want of consideration, but wholly failed. Afterward they discovered that the donee had declared that the testator, the donor, had by his will not only released the donee from a considerable debt, but he had also made a present to him of the note in question. These admissions showed the note to be without consideration; but the court declined to grant a new trial, and upon appeal this ruling was affirmed. The court seems to have lost sight of the actual point in the case, and discussed the question whether a promissory note payable to the donor could be made the subject of a gift without indorsement by the donor, reaching the conclusion that it could.² Of this proposition there is no doubt; and it is for this that the case is cited by the Chancellor in a subsequent case, and not upon the validity of a gift of the donor's own note.³ But this very fact seems to have entirely escaped the attention of the Supe-

¹ Lord Loughborough, L. C., in *Tate v. Hilbert*, 2 Ves. Jr. 111 (1793), said: "It was observed for the defendant that the case of *Lawson v. Lawson* was over-turned by Lord Hardwicke. I have caused the register's book to be searched, and the report in *P. Williams* is certainly inaccurate, but the decision is perfectly right."

² *Wright v. Wright*, 1 Cow. 598.

³ *Contant v. Schuyler*, 1 Paige Ch. 316.

rior Court of New York city, when it subsequently decided the donor's own note to be a valid gift, while it admitted that a different rule prevailed in Massachusetts and England.¹ So a voluntary bond, payable to the donee at the death of the donor, has been enforced against his estate, although the donor had made a will disposing of the bond, and the gift of the bond tended to disappoint such will.² So where a son gave his father his own note and afterward intended to bequeath it to him, but the scrivener advised him that he might effectually declare his intention on the back of the note, which he accordingly did; and he also frequently spoke of the fact to his wife, the residuary legatee, and directed her, in case of his death, to give the note to his father, and she so behaved as to satisfy him that she had, and after her husband's death promised the father he should have it—she, upon a bill brought by the father for that purpose, was enjoined from collecting it. This was put upon the ground that she prevented her husband, the son, from making provision in the will for the father by virtually declaring that he need not alter his will to carry out his intention, for she would see that it would be done.³ But allowing a gift of the donor's note to be upheld, especially in the case of a *donatio mortis causa*, is attended with grave dangers. "The introduction into our law of the doctrine contended for by

¹ *Parker v. Emerson*, 9 Law Reporter, 76; S. C. 4 N. Y. Leg. Obs. 219.

² *Isenhardt v. Brown*, 2 Edw. Ch. 341. The court cited *Jones v. Powell*, 1 Eq. Cas. Abr. 84; *Cray v. Rooke*, Talb. Cas. 156; *Lechmere v. Earl of Carlisle*, 3 P. Wms. 222; and *Lady Cox's Case*, *Ib.* 339.

The case of *Wright v. Wright*, *supra*, has been denied in a number of cases. See *Hall v. Howard, Rice, L.* (S. C.) p. 314 ("not founded on principle, and has no authority to sustain it"); denied in *Holley v. Adams*, 16 Vt. 206; S. C. 42 Am. Dec. 508; *Parish v. Stone*, 14 Pick. 198; S. C. 25 Am. Dec. 378; *Raymond v. Sellick*, 10 Conn. 480. Overruled in *Harris v. Clark*, 3 N. Y. 93.

³ *Richardson v. Adams*, 10 Yerg. 273; *Wickett v. Raby*, 3 Bro. P. Cas. 16.

the plaintiff," said the Supreme Court of Connecticut, "might be attended with serious consequences. If notes executed by a man in his last sickness, and without consideration, were binding upon his estate, a new method would be devised of disposing of estates without the trouble and formalities of wills. These notes might be executed in private and without the aid or presence of witnesses. The individuals surrounding the bed of a feeble and dying man might, by their importunities, prevent [secure] the execution of such notes, and sweep from his heirs, not a specific chattel, bond, or bill, but his whole estate, real and personal. His lands, as well as his personal estate, might be sold for the payment of such notes, and thus the wholesome provisions of the law relating to devises might be effectually evaded."¹

303. DONOR'S OWN MORTGAGE TO DONEE.—In some jurisdictions the donor's own mortgage given by him to the donee, to secure the gift of a sum of money promised, will be enforced. Not in all jurisdictions, as we shall see, is such the case. The distinction to be drawn is between those cases which hold that the fee of the land mortgaged passes, and those which hold that it does not. In the former case the mortgagor retains an equity of redemption, equivalent, for many purposes, to a general ownership of

¹ Raymond v. Sellick, 10 Conn. 480. Where a note was given by a mother to a trustee for her child *enciente*, the court said it was not sufficiently *nudum pactum* to allow a demurrer to a bill by the child and the trustee to have it carried into execution: Seton v. Seton, 2 Bro. Ch. 610. So, where a testator gave in her lifetime to the plaintiff a note to pay him or order "on demand £100 for value received and his kindness to me," with a verbal engagement on the part of the plaintiff that the note should not be demanded until after her death, it was held that parol evidence could not be received to show that it was not given for a valuable consideration, and that it did not operate by way of testamentary disposition, nor was it void on the ground that it was a fraud on the legacy duty, that duty never being attached upon it and there being nothing to show that the amount passed by way of *donatio mortis causa*: Woodbridge v. Spooner, 1 Chitty, 661.

the land, but yet, in point of form, an equity. The mortgagee must go into a court of equity to enforce his mortgage, as the mortgagor must in order to redeem; and the latter must do this, not because the mortgage is an executory contract, and requires the aid of a court of chancery, but to compel a specific performance. On non-performance the conditions of the mortgage is forfeited at law, but the equity of redemption remains in the mortgagor or his representatives. That equity can only be extinguished by a decree, or an equivalent proceeding under a positive statute. Therefore, a donee of the mortgage of the donor brings the action, not for the purpose of being aided in establishing his mortgage under the notion of remedying a defective conveyance, or obtaining a specific performance, but to foreclose and extinguish the donor's equity of redemption, which a court of law is not competent to deal with. He does not come to establish a voluntary equitable agreement, but to enforce a legal title under an executed conveyance, and to cut off an equity attached to that legal title and vested in the donor. Such a voluntary mortgage is valid, and will be enforced.¹

304. SUBSCRIPTION TO A CHARITY, CHURCH, COLLEGE, ETC.—A note given as a subscription to a charity, an educational institution, or a religious denomination, in aid of the object of its creation, is valid and will be enforced by the courts. Thus the charter of an educational society empowered it to purchase or receive by donation, devise, or bequest, land, moneys, rents, goods, or chattels, and hold them for the use and benefit of the society, according to the intention of the donor. A note was executed to this society, without specifying the object of the donation, and

¹ *Bucklin v. Bucklin*, 1 Abb. App. Dec. 242; *Van Amburgh v. Kramer*, 16 Hun, 205. See *Hunt v. Johnson*, 44 N. Y. 27; S. C. 4 Amer. Rep. 631.

this obligation was enforced by the court. The court said that the donation was authorized by law, and the law imposed upon the society the obligation to use and appropriate it in carrying out charitable and benevolent objects of the society and the donor. "In the execution of this note then," said the court, "there was on one side the obligation to appropriate this fund according to the provision of the charter, and the promise to pay on the other. Liabilities were doubtless incurred upon the faith of it, and the note viewed in connection with the law, which authorized it, shows, in our opinion, a sufficient consideration for its execution, and to estop the defendant to deny that there was no legal or valuable consideration."¹ But it cannot be said that all the cases are put upon this ground. "The real consideration for his promise," said the Supreme Court of Indiana, "is the promise which others have already made, or which he expects them to make, to contribute to the same object."² It will be observed that it is totally immaterial, in this view of the question, that the donee entered into engagements that were binding upon it, or erected buildings, relying upon such promises, in order to be able to enforce such an obligation.³ It makes no difference that the object sub-

¹ *Collier v. Baptist Education Society*, 8 B. Mon. 68; *Kentucky Female Orphan School v. Fleming*, 10 Bush. 234; *Watkins v. Eames*, 9 Cush. 537; *Thompson v. Page*, 1 Met. 565; *Garrigue v. Home, etc., Society*, 3 Ind. App. 91.

² *Peirce v. Ruley*, 5 Ind. 69; quoted in *Petty v. Trustees of Church of Christ, etc.*, 95 Ind. 278. See, also, *Kinsley v. International, etc., Co.*, 41 Ill. App. 259.

³ *Watkins v. Eames*, 9 Cush. 537; *Amherst Academy v. Cows*, 6 Pick. 427; (criticising *Bowers v. Hurd*, 10 Mass. 427); *Boutell v. Cowdin*, 9 Mass. 254; *Limerick Academy v. Davis*, 11 Mass. 113; *Farmington Academy v. Allen*, 14 Mass. 172; *Bridgewater Academy v. Gilbert*, 2 Pick. 579; *First Religious Society v. Stone*, 7 Johns. 112; *Ives v. Sterling*, 6 Met. 310; *Trustees of Hanson v. Stetson*, 5 Pick. 506; *Ladies' Collegiate Institute v. French*, 16 Gray, 196; *Twenty-Third Street Church v. Cornell*, 117 N. Y. 601; S. C. 24 J. & S. 260; *Gorman v. Carroll*, 7 Allen, 199; *Jewett v. Salisbury*, 16 Ind. 370; *First Baptist Society v. Robinson*, 21 N. Y. 234; *Johnston v. Wabash College*, 2 Ind. 555; *Northwestern*

scribed to is a private enterprise.¹ In discussing this phase of the question, Judge Manning said of a college subscription: "It is not denied that here is a promise, but it is said that the plaintiff in error is not bound by it, because there was no consideration for it. What is a consideration? The price paid, or agreed to be paid, for the promise—that is, the thing done, or agreed to be done, is the consideration. Hence, mutual promises are a good consideration for each other; as, when A promises B to do a certain thing, in consideration that B promises A to do a certain thing. It is not necessary that either party should be pecuniarily benefited by the act done, or to be done, by the other. The promise may inure to the benefit of a third person, and not of the party to whom it is made. It is immaterial, therefore, that the college which is to receive the benefit of the promise is not a party to it. The benefit to the college is the inducement to, and not the consideration of, the promise, which is the subscription of the paper by others. Each subscriber promises to pay to the person named in the subscription, for the purpose therein mentioned, the sum set opposite his name, in consideration of a like promise by every other subscriber. This is clearly implied in the subscription itself. It is the understanding of every person who puts his name to a subscription paper; and when the ob-

Conference v. Myers, 36 Ind. 375; *Higert v. Asbury University*, 53 Ind. 326; *George v. Harris*, 4 N. H. 533; *Congregational Society v. Perry*, 6 N. H. 164; *M'Auley v. Billenger*, 20 Johns. 89; *Underwood v. Waldron*, 12 Mich. 73; *Troy Conference Academy v. Nelson*, 24 Vt. 189; *Patchin v. Swift*, 21 Vt. 292; *State Treasurer v. Cross*, 9 Vt. 289; *Higgins v. Riddell*, 12 Wis. 587; *Lathrop v. Knapp*, 27 Wis. 214; *Christian College v. Hendlev*, 49 Cal. 347; *Pillans v. Mi-erop*, 3 Burr. 1673; *Jones v. Ashburnham*, 4 East. 455; *Van Rensselaer v. Aikin*, 44 Barb. 547; *Roberts v. Cobb*, 103 N. Y. 600; *Commissioners of the Canal Fund v. Perry*, 5 Ohio St. 55; *Comstock v. Howd*, 15 Mich. 237; *Wesleyan Seminary v. Fisher*, 4 Mich. 515; *Baker v. Johnston*, 21 Mich. 319; *Trustees of the Parsonage Fund v. Ripley*, 6 Greenl. 442.

¹ *Lathrop v. Knapp*, 27 Wis. 214.

ject is conducive to the public weal, as in the case before us, it seems to me it would be a strange perversion of legal principle to refuse to enforce the subscription on a plea of want of consideration.”¹ In a few cases the question of consideration is really not involved; but the courts seem unable to get rid of the notion of the sufficiency of a consideration, although that question is really unnecessary to a decision of the case. The case first cited from Kentucky² is one of this kind, where the court insisted upon discussing the sufficiency of the consideration, although the validity of the gift could have been easily upheld (and this was hinted) upon another ground. Thus where an act of the Legislature expressly authorizes a donation to a certain person or corporation, and authorizes the latter to accept it, it may be upheld on this ground alone, even though it be a written promise to contribute property or money. The Legislature is clearly competent to do this.³

305. ACCEPTANCE OF SUBSCRIPTION.—A third class of cases recognize the doctrine that the subscription is in the nature of a proposition, which becomes mutual and binding when accepted by the promisee, and he, in good faith, commences the work contemplated by the subscription. This line of authorities is expressly put upon the ground that there was an acceptance and expenditure of money in reliance thereon. “Although the promise would not have been mutual if the corporation had sued before they had made any advances toward the erection of the build-

¹ *Underwood v. Waldron*, 12 Mich. 73, 92; *Hudson v. Green Hill Seminary*, 113 Ill. 618.

² *Collier v. Baptist Education Society*, 8 B. Mon. 68.

³ *Commissioners of the Canal Fund v. Perry*, 5 Ohio, 55.

A few decisions hold notes payable to colleges, and the like, as mere promises to make a gift, and void: *Gammon Theological Seminary v. Robbins*, 128 Ind. 85; *Simpson Centenary College v. Tuttle*, 71 Ia. 596.

ings," said the Supreme Court of Vermont; "yet, it cannot be said, after the acceptance of the subscription, the appointment of a committee to superintend the structure, and a commencement in fact of the work, that the promise was not mutual; for with the commencement of such labors, in good faith, with a view to the ultimate completion of the superstructure, was a consummation of the consideration, and bound the defendant Buell to a performance on his part."¹ If this view is taken of the transaction, then there must be an actual commencement of the proposed work subscribed to, or an expenditure of money by the promisee, who must rely thereon. In such an instance the matter lies, it seems to us, more in estoppel than in contract; but it matters not which view of the transaction is taken, for the result is the same. Thus subscribers to a paper therein agreed to lend the sums of money set against their names respectively, for the purpose of establishing a newspaper, and appointed a certain person to receive and manage the application of the money. The person so appointed advanced his own money, and then brought an action to recover the amount subscribed from one of the subscribers. The action was sustained, the court considering "that by means of the contract, Larkin [the appointee] was led to confide in the engagement of the defendant so far as to advance money for him, and should recover it back."² So where the defendant with others subscribed to the repair of a church, upon the express provision "that no person should be obliged to pay the sum which he subscribed, unless a sufficient sum was raised to repair the church;" and the committee in charge entered into a contract with a person to make the repairs for a specific sum, who engaged to

¹ *University of Vermont v. Buell*, 2 Vt. 48.

² *Homes v. Dana*, 12 Mass. 190.

take the subscriptions, being about one-half of that sum, in payment, and to raise the residue by the sale of the pews, which he was authorized to make, the defendant was not allowed to escape liability, for there was a compliance with the conditions. "The consideration for his promise was the repairing of the church," said the court. "By signing the subscription he sanctioned the acts of the meeting in resolving to make the repairs, and in the appointment of the committee for that purpose."¹ So where the defendant subscribed to a college on the ground that it should be located at a certain place, it was held that after the decision to locate it at the place designated, and the entering by the corporation into binding contracts for the erection of buildings, the subscriptions were accepted and became binding upon those subscribing.² Such a contract is not joint, but several.³ In the case of a subscription to a proposed railroad, the Supreme Court of Michigan has construed it to be conditional upon the completion of the road.⁴ So one of several stockholders cannot back out of an agreement which all have entered into to constitute a number of shares each, to be sold for the

¹ *M'Auley v. Billenger*, 20 Johns. 89.

² *Wayne and Ontario Collegiate Institute v. Smith*, 36 Barb. 576; *Barnes v. Perine*, 9 Barb. 202; *S. C.* 15 Barb. 249; 12 N. Y. 18; *Wayne and Ontario Collegiate Institute v. Devinney*, 43 Barb. 220; *Van Rensselaer v. Aikin*, 44 Barb. 547; *Hutchins v. Smith*, 46 Barb. 235; *Presbyterian Church of Albany v. Cooper*, 45 Hun, 453; *Richmondville Union Seminary, etc., v. Brownell*, 37 Barb. 535; *Roberts v. Cobb*, 103 N. Y. 600; *Lathrop v. Knapp*, 27 Wis. 214 (said to be estopped); *McDonald v. Gray*, 11 Ia. 508; *Burlington University v. Barrett*, 22 Ia. 60; *Robertson v. March*, 3 Scam. (Ill.) 198; *Pryor v. Cain*, 25 Ill. 263; *Thompson v. Mercer Co.*, 40 Ill. 379; *McClure v. Wilson*, 43 Ill. 356 (substitute for a draft); *Miller v. Ballard*, 46 Ill. 377; *Kentucky Baptist Education Society v. Carter*, 72 Ill. 247; *Whitsilt v. Pre-emption Presbyterian Church*, 110 Ill. 125 (specific performance); *Ryerss v. Presbyterian Congregation*, 33 Pa. St. 114; *Reimensnyder v. Gans*, 110 Pa. St. 17; *Stevens v. Corbitt*, 33 Mich. 458.

³ *Robertson v. March*, 3 Scam. (Ill.) 198.

⁴ *Stevens v. Corbitt*, 33 Mich. 458; *Michigan, etc., R. R. Co. v. Bacon*, 33 Mich. 466; *Tower v. Detroit, etc., R. R. Co.*, 34 Mich. 329.

benefit of the corporation, after the rest, in reliance upon the agreement, have contributed their proportion.¹ Many of the cases cited in this section are made to turn upon the fact that debts had been incurred, or things done, by the donee, who was at the time relying upon the promise of the donor or donors ; but in several of the States from which cases are herein cited, the rule is in force which holds the donor liable upon the ground discussed in the preceding section. It may be remarked, however, that the fact of the subscription alone does not raise a binding promise on the part of the donee to do anything, nor does it constitute a request to do anything, nor can such a request be implied. The understanding among the subscribers does not change the rule. But a subscription invalid at the time for want of a consideration may be made valid and binding by a consideration arising subsequently between the subscribers and the donee.²

306. ACCEPTANCE — REVOCATION — DEATH OF SUBSCRIBER.—There must be an acceptance on the part of the person or company to be benefited by the proposed donation ; but this acceptance will be inferred from the mere act of bringing an action thereon, unless the subscription was conditional ;³ but in those States where the doctrine of (quasi) estoppel is invoked to uphold these gifts or donations “an acceptance can only be shown by some act on the part of the promisee whereby some legal liability is incurred or money is expended on the faith of the promise.”⁴ “If the promisor dies,” says the Supreme

¹ *Conrad v. La Rue*, 52 Mich. 83.

² *Presbyterian Church of Albany v. Cooper*, 112 N. Y. 517. See *Barnes v. Perine*, 12 N. Y. 18 ; *Roberts v. Cobb*, 103 N. Y. 600 ; S. C. 21 N. Y. St. Rep. 503. Subscription to a Grand Army encampment held valid : *Kinsley v. International, etc., Co.*, 41 Ill. App. 259.

³ *Northern Central Michigan R. R. Co. v. Eslow*, 40 Mich. 222.

⁴ *Grand Lodge of Good Templars v. Farnham*, 70 Cal. 158.

Court of California, "before his offer is accepted it is thereby revoked, and cannot afterward, by any act showing acceptance, be made good as against his estate.¹ The rule is otherwise," continues the court, "where subscribers agree together to make up a specified sum, and where the withdrawal of one increases the amount to be paid by the others. In such a case, as between the subscribers, there is a mutual liability, and the co-subscribers may maintain an action against one who refuses to pay."² The death of the subscriber is a cancellation of his subscription, and it cannot be enforced against his estate.³

307. WHO MAY SUE UPON SUBSCRIPTION.—It is immaterial that no promisee or donee is named, if some one is mutually designated to collect the money subscribed. Such a designation places the subscription on the same ground as if his name had been inserted in it as the payee. Thus where a subscription was taken to give a free dinner to "returned soldiers," and a certain person was duly selected by those starting the subscription to secure subscribers, collect the money, and make all necessary disbursements, it was held that such person was the proper plaintiff to sue and collect any of the unpaid subscriptions.⁴ So the trustees of an unincorporated society organized for a lawful purpose may receive promises on its behalf; and a mutual subscription on its behalf may be supported, even though no payee be named, if the ob-

¹ *Pratt v. Trustees, etc.*, 93 Ill. 475; *Beach v. First M. E. Church*, 96 Ill. 177; *Phipps v. Jones*, 20 Pa. St. 260; *Helfenstein's Estate*, 77 Pa. St. 328; *Cottage Street Church v. Kendall*, 121 Mass. 528.

² Citing *George v. Harris*, 4 N. H. 533; *Curry v. Rogers*, 21 N. H. 247.

³ *Grand Lodge of Good Templars v. Farnham*, 70 Cal. 158; *Reimensnyder v. Gans*, 110 Pa. St. 17.

⁴ *Comstock v. Howd*, 15 Mich. 237. This is especially true if he has went forward and advanced money to complete the proposed work: *Van Rensselaer v. Aiken*, 44 Barb. 547.

ject is made definite and certain.¹ So an agreement to pay A, "treasurer" of an unincorporated corporation, which is to be incorporated, may be enforced in the name of A alone, the word "treasurer" being rejected as surplusage.² So it has been held that a subscription to be paid to a person to be elected by a proposed corporation may be enforced in the name of the corporation after it is organized.³

308. SUNDAY SUBSCRIPTIONS.—A subscription upon Sunday to build a church is valid, and so is one to a charity.⁴ But the contrary has been held, and a note executed on Sunday held void, upon the ground that its execution was an act of common labor forbidden by the statute.⁵

309. CONDITIONAL PROMISE—CONSIDERATION.—It is elementary that a promise to make a gift upon a certain contingency, that contingency must happen, or no claim can be made that an obligation rests upon the donor to make the gift. And if the condition is that the donee will do or refrain from doing something, and he complies with the conditions, the donor is bound to stand by his proposition. But here we pass beyond the gift into a contract. Thus, where a proposition was made to a county that, if it would raise \$2,000 and pay it to a corporation for the purpose of erecting a monument, the person proposing would pay such corporation \$1,000, and the county raised the money and paid it over to the corporation, it was

¹ Allen v. Duffie, 43 Mich. 1.

² McDonald v. Gray, 11 Ia. 508.

³ Wayne and Ontario Collegiate Institute v. Greenwood, 40 Barb. 72; Farmington Academy v. Allen, 14 Mass. 172; Limerick Academy v. Davis, 11 Mass. 113.

⁴ Allen v. Duffie, 43 Mich. 1; S. C. 38 Am. Rep. 159; Dale v. Knapp, 98 Pa. St. 389; S. C. 42 Amer. Rep. 624; 38 Amer. 165; Bryan v. Watson, 127 Ind. 42.

⁵ Catlett v. M. E. Church, 62 Ind. 365; S. C. 30 Amer. Rep. 197. This case is overruled in Bryan v. Watson, *supra*.

adjudged that the person so proposing was legally bound to pay over the \$1,000. The proposition had been accepted and become a contract that could not be revoked.¹ So, where the defendant subscribed \$5,000 toward a fund of \$45,000 to be raised to pay the principal of a mortgage on a church, upon the express condition that the full sum of \$45,000 should be subscribed or paid in for that purpose, and that, if, within one year from the date of the subscription, the full sum should not be subscribed or paid for such purpose, then the agreement was to be null and of no effect; and among the subscriptions was one for \$5,000 by the "Ladies' Association" of the church, signed by the lady president, which consisted of such ladies of the church as contributed to its benevolent work, who, at a meeting at which some twenty-five or thirty were present, passed a resolution pledging themselves to raise that sum; one for \$500 by "Sunday-school," made by the superintendent, and approved and ratified at a meeting of the officers and teachers; and the young men of the church, at a regularly organized meeting, also passed a resolution pledging themselves to pay \$1,500, and requested the chairman of the meeting to sign the subscription papers, which he did—it was held that the defendant was not liable for the reason that the subscriptions above set forth were all invalid, while valid subscriptions for an actual payment of the full amount were a condition precedent to the testator's liability. Nor did the court consider the fact that the donor had paid a part of his subscription, with full knowledge of these invalid subscriptions, amount to a waiver of the condition precedent, or estop him.²

¹ *La Fayette County v. Magoon*, 73 Wis. 627.

² *Presbyterian Church of Albany v. Cooper*, 45 Hun, 453; S. C. 10 N. Y. St. Rep. 142. This case was affirmed, but upon different grounds from that stated

310. LIABILITY OF A SINGLE DONOR OR SUBSCRIBER—
MUTUAL SUBSCRIPTION NOT SUFFICIENT TO BIND DONORS.

—If there be but one subscriber, then it is evident that the rule that the promises of other subscribers is a sufficient consideration to uphold his promise cannot apply; and if the donee has not promised something in consideration of the promise of the donor, or has not assumed some liability, or changed his position, the validity of the donor's promise must rest upon the sole ground that there is an implied promise on the part of the donee to apply the gift to the object to which it was given and in the manner, when that is the case, therein designated. A few cases, as we have seen, uphold simple promises of this kind. Perhaps two or more separate promises, made by the donors with knowledge of one or more of them would be construed as resting upon the same consideration as if they were all made jointly by the signing of the same instrument. But a note of the donor, where no other note or notes are given, rests upon a different ground, so far as mutual promises are concerned, from the promises of two or more. This distinction was drawn at quite an early date by Chancellor Walworth. "As a subscription of a single individual, agreeing to make a donation to another individual or to a corporation for the benefit of the donee merely, I should have great difficulty in finding a valid consideration to sustain a promise to give without any equivalent therefor, and without any binding agreement on his part which would be a loss or injury to him. And it can hardly be said to be a consideration to support a promise of a donor to give at a future time, that the donee agreed to receive and invest the fund when paid and to

above. It was affirmed upon the distinct ground that, as the church had not agreed to do anything if the subscription was made, nor had assumed any liability nor done anything because of the promise, the contract was invalid: 112 N. Y. 517; S. C. 21 N. Y. St. Rep. 503.

apply it to the payment of his debts generally, or any particular class of his debts; or to apply it to the payment of such sums as he may thereafter agree to give to his servants for their services. . . . Neither is there any difficulty in my mind in finding a good and sufficient consideration to support a subscription of this kind made by several individuals. Every member of society has an interest in supporting the institutions of religion and of learning in the community where he resides. And where he consents to become a subscriber with others to raise a fund for that purpose, the real consideration for his promise is the promise which others have already made or which he expects them to make, to contribute to the same object. In other words, the mutual promises of the several subscribers to contribute toward the fund to be raised for the specified object in which all feel an interest, is the real consideration of the promise of each. For this purpose also, the various subscriptions to the same paper and for the same object, although in fact made at different times, may in legal contemplation be considered as having been made simultaneously. The consideration of the promise, therefore, is not any consideration of benefit received by each subscriber from the religious or literary corporation to which the amount of his subscription is made payable, nor is his promise founded upon any consideration or injury which the payee has sustained or is to sustain or be put to for his benefit. But the consideration of the promise of each subscriber is the corresponding promise which is made by other subscribers.”¹ But upon appeal the Court of Appeals totally disagreed with the Chancellor in so far as he held that if several subscribe to a common cause the subscription was valid; and held that the endowment of a literary institution was not

¹*Stewart v. Hamilton College*, 2 Denio, 403.

a sufficient consideration to uphold a subscription to a fund designed for that object. The case has met with decided disfavor, and may be considered of little weight as an authority.¹ So, in Massachusetts, a like doctrine has been followed; indeed, it may be said that the Supreme Court in that State has gone to a considerable length in holding the kind of contracts under discussion void. In that case, at a meeting, several persons announced that they would each give a named sum for the purpose of repairing a church, and the secretary of the meeting wrote down their names and the amounts. The meeting was called for the purpose of securing money to repair the church. The defendant subscribed, and afterward orally ratified his subscription. Being treasurer of the church, he collected part of the subscriptions. Trouble arising, he withdrew from the office of treasurer, upon request made, and thereafter ceased all participation in the affairs of the church society, except that he remained one of the trustees. The church repairs were made, and then an action was brought to recover from the defendant the amount of his subscription. There was conflicting evidence as to whether anything was done, or any liability incurred or obligation assumed, by the plaintiff in reliance upon this particular subscription. Upon these facts the court decided that the defendant was not liable. The court, in explanation of its decision, said: "In every case in which this court has sustained an action upon a promise of this description, the promisee's acceptance of the defendant's promise was shown, either by express note or contract, assuming a liability or obligation, legal or equitable, or else by some unequivocal act, such as advancing or expending money, or erecting a building, in accordance

¹ Hamilton College v. Stewart, 1 N. Y. 581. Doctrine affirmed in Presbyterian Church of Albany v. Cooper, 112 N. Y. 517.

with the terms of the contract, and upon the faith of the defendant's promise." The court seemed willing to admit that, as between the donors or subscribers, the contract of subscription might be valid, but not as between the donee and the donors. "The facts in the present case," said the court, "show no benefit to the defendant, and no note or contract by the plaintiff, and, although it appears that the chapel was afterward built by the plaintiff, it is expressly stated in the bill of exceptions that the learned judge who presided at the trial did not pass upon the question of fact whether the plaintiff had, in reliance upon the promise sued on, done anything or incurred or assumed any liability or obligation. It does not therefore appear that there was any legal consideration for the promise upon which this action is brought."¹ But where a donor proposed that if a certain person would raise a named sum and pay it to a corporation for the purpose of erecting a monument, he would also pay a certain sum, the raising of the sum named by the person to whom the proposition was made, and the payment to the corporation, was held to constitute a valid contract, which could be enforced.²

¹ Cottage Street M. E. Church *v.* Kendall, 121 Mass. 528; Low *v.* Foss, 121 Mass. 531.

² La Fayette County *v.* Magoon, 73 Wis. 627. See Gammon Theological Seminary *v.* Robbins, 128 Ind. 85; Simpson Centenary College *v.* Tuttle, 71 Ia. 596. See, also, Garrigues *v.* Home, etc., Society, 3 Ind. App. 91.

CHAPTER XII.

BANK CHECKS AND DEPOSITS.

311. Division of Subject.

CHECKS.

- 312. Definition of Check.
- 313. Checks Not Bills of Exchange.
- 314. Check of Donor as a Gift Inter Vivos.
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- 341. Same Continued—Some Massachusetts Cases.

311. DIVISION OF SUBJECT.—The subject of gifts of bank accounts or bank deposits may be divided into the

subject of (1) checks, (2) gifts of bank-books or certificates of deposits, and (3) savings bank deposits.

CHECKS.

312. DEFINITION OF A CHECK.—A check has been defined by an author of established reputation for accuracy, to be “an inland bill of exchange drawn upon a banker, payable to bearer on demand.”¹ Another authority has defined it to be “a bill of exchange payable on demand.”² “A check is a bill of exchange drawn by a customer on his banker payable on demand.”³ It has been defined by the Supreme Court of Massachusetts to be “an order to pay the holder a sum of money at the bank, on presentment of the check and demand of the money;” and it is added that “no previous notice is necessary, no acceptance is required or expected, it has no days of grace. It is payable on presentment and not before.”⁴ In New Jersey a better definition of a check has been given in some respects than any we have quoted; for it is said that “a check or draft is a request to pay money to the drawer, or his order, *as a right*, if he have funds, but in some measure as a matter of *favor*, if he have not. If there be funds belonging to the drawer, it is a demand of them; if not, it is a request of credit to that amount.”⁵ In an Indiana case it is said that “a check is defined to be a written order or request, addressed to a bank, or to persons carrying on the business of bankers, by a party having money in their hands, requesting them to pay on presentment, to another person, or to him or bearer, or to him or order, a certain sum of money specified in the instrument.”⁶ The distinguishing feature of all these defi-

¹ Byles on Bills, 13.

² Edwards on Bills, 396.

³ Benjamin Chalmer's Bills and Notes, art. 254.

⁴ Bullard v. Randall, 1 Gray, p. 606.

⁵ State v. Rickey, 4 Halst., p. 312.

⁶ Griffin v. Kemp, 46 Ind. 172. This is the definition of Burrill. Harrison v.

nitions is that they, especially those of the courts, regard a check nothing more than a direction, request, or order upon a bank or banker to pay out, on account of the drawer, a certain named sum of money. Indeed, in an Ohio case, it is said that "a check is but an order to pay the holder so much money out of a fund in the drawee's bonds, deposited for the express purpose of being recalled by draft, at the option of the customer."¹

313. CHECKS NOT BILLS OF EXCHANGE.—Several of the definitions quoted above put checks upon a level with inland bills of exchange (for no one will contend that they are like foreign bills of exchange, unless drawn upon a bank in a foreign country); but they are not in all respects alike. Perhaps a better idea of a check can be obtained by comparing it with an inland bill of exchange, and seeing wherein they are alike and wherein they differ; and for this purpose we make the following quotation from an opinion of the Supreme Court of the United States: "Bank checks," says the court, "are not inland bills of exchange, but have many of the properties of such commercial paper; and many of the rules of the law merchant are alike applicable to both. Each is for a specific sum payable in money. In both cases there is a drawer, a drawee, and a payee. Without acceptance, no action can be maintained by the holder upon either against the drawer. The chief points of difference are that a check is always drawn on a bank or banker. No days of grace are allowed. The drawer is not discharged by the laches of the holder in presentment for payment, unless he can show that he has sustained some injury by the default. It is not due until payment is demanded, and the statute of Wright, 100 Ind. 515; S. C. 50 Am. Rep. 805; *Bowen v. Newell*, 5 Sandf., p. 328.

¹ *McGregor v. Loomis*, 1 Dis. (Ohio), p. 256.

limitations runs only from that time. It is by its face the appropriation of so much money of the drawer in the hands of the drawee to the payment of an admitted liability of the drawer. It is not necessary that the drawer of a bill should have funds in the hands of the drawee. A check in such a case would be a fraud. All the authorities, both English and American, hold that a check may be accepted, though acceptance is not usual. By the law merchant of this country, the certificate of the bank that a check is good is equivalent to acceptance. It implies that the check is drawn upon sufficient funds in the hands of the drawee, that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment. It is an undertaking that the check is good then and shall continue good, and this agreement is as binding on the bank as its notes of circulation, a certificate of deposit payable to the order of the depositor, or any other obligation it can assume. The object of certifying a check, as regards both parties, is to enable the holder to use it as money. The transferee takes it with the same readiness and sense of security that he would take the notes of the bank. It is available also to him for all the purposes of money. Thus it continues to perform its important functions until in the course of business it goes back to the bank for redemption and is extinguished by payment.”¹ Speaking upon this subject, the Supreme Court of Indiana said: “The circumstances in which they [checks] principally differ from bills of exchange, or at least from bills of exchange in ordinary use and circulation, are: 1st. They are always drawn on a bank, or on bankers, and are payable on presentment without any days of grace. 2d. They require no acceptance as distinct from prompt payment. 3d. They are

¹ *Merchants' National Bank v. State Bank*, 10 Wall. 604, 647.

always supposed to be drawn upon a previous deposit of funds. A check so far differs from a bill of exchange or note, that its payment may be countermanded by the drawer before it is accepted or paid by the bank; and so the death or insolvency of the drawer is in the nature of a countermand of the payment, and the bank ought not to pay; but if the bank pays without notice of the death, it is said to be a good payment.”¹ “A cheque,”² said Baron Parke, “does not require acceptance; in the ordinary course it is never accepted; it is intended for circulation, it is given for immediate payment; it is not entitled to days of grace; and though it is, strictly speaking, an order upon a debtor by a creditor to pay to a third person the whole or part of a debt, yet, in the ordinary understanding of persons, it is not so considered. It is more like an appropriation of what is treated as ready money in the hands of the banker, and in giving the order to appropriate to a creditor, the person giving the cheque must be considered as the person primarily liable to pay, who orders his debt to be paid at a particular place, and as being much in the same position as the maker of a promissory note, or the acceptor of a bill of exchange, payable at a particular place and not elsewhere, who has no right to insist on immediate presentment at that place.”³ A striking characteristic of checks is that they are payable upon demand made at the bank upon which they are drawn. If an instrument in the form of a check is made payable at a future day, it is usually regarded as an inland

¹ *Griffin v. Kemp*, 46 Ind. 172. See *Harrison v. Wright*, 100 Ind. 515; S. C. 50 Amer. Rep. 805.

² “*Cheque*” is the English spelling, in imitation of *exchequer*, with which it is remotely connected: *Century Dict. check*, No. 1.

³ *Mullick v. Radakissen*, 9 Moore P. C. 46, 69. See *Lynn v. Bell*, 10 Ir. Rep. C. L. 487; *Keene v. Beard*, 8 C. B. N. S., p. 380; *Hopkinson v. Forster*, L. R. 19 Eq. 74.

bill of exchange;¹ but in some States it is treated as a check.²

314. CHECK OF DONOR AS A GIFT INTER VIVOS.—One of the earliest, if not the earliest, cases on this subject was decided in 1793. Suit was brought by the holder of a check for £200 against the administrators of the estate of the drawer to recover from the estate the amount of the check. The gift was not made in view of death, and therefore a gift *inter vivos*. The gift of the check was made several days before the testator died, when he was not apprehensive of death; and upon these points there was no dispute. But the court held that the holder of the check, the donee, could not recover because she had not tendered it to the banker upon whom drawn before the death of the donor and drawer, the court saying that “the authority to pay clearly expired with the death of the testator.” But the court added that, if the check had been “received at the banker’s before notice of the death of the party, or immediately after, it might have availed; but for want of activity in the holder of it, it is become of no effect.”³ About two weeks before her death,

¹ *Glenn v. Noble*, 1 Blackf. 104; *Minturn v. Fisher*, 4 Cal. 35; *Bowen v. Newell*, 13 N. Y. 290; *Morrison v. Bailey*, 5 Ohio St. 13; but see *Andrew v. Blachly*, 11 Ohio St. 89, where the nature of the instrument was determined by the intention of the parties.

² *Champion v. Gordon*, 70 Pa. St. 474; *Lawson v. Richards*, 6 Phila. 179; *Westminster Bank v. Wheaton*, 4 R. I. 30.

³ *Tate v. Hilbert*, 4 Brown, Ch. 286; S. C. 2 Ves. Jr. 111. From this dictum, that, if the check had been paid after the drawer’s death, but before notice of it by the bank, the bank would have been protected, has arisen the statement, by all the text writers, that a payment under such circumstances is valid so far as the bank is concerned. In the instance of a check given for value, Mr. Daniels has denied the soundness of this doctrine, claiming that payment after notice of the drawer’s death is a protection to the banker; but at the same time admitting that, if the check were a gift and the banker knew that fact at the time of payment, he would not be protected if he paid it: 3 Vir. L. Jr. 323 (1879); same article, 13 Irish L. T. 448, taken from the *Bankers’ Magazine* for 1879.

a mother gave her daughter a check on a bank, but the daughter did not present it for acceptance or payment until after the death of her mother. Payment was declined and a suit instituted by the daughter against the bank, but a recovery was denied. "It seems clear to us," said the court, "that until the check was either paid or accepted the gift was incomplete, and that in the absence of such payment or acceptance the death of the drawer operated as a revocation of the check. It is well settled that, in order to constitute a valid gift, there must be a complete delivery of the subject of the gift, either actual or constructive. The check in the present instance was a mere order or authority to the payee to draw the money; and, being without consideration, it was subject to be countermanded or revoked while it remained unacted on in the hands of the payee."¹

315. CHECK OF DONOR ACCEPTED OR CASHED.—Where a check, however, has been cashed by the drawee before the death of the drawer, the money received by virtue of the check is a valid gift, and is not revoked by the death of the donor. Thus the Civil Code of Louisiana provided that a "manual gift—that is, the giving of corporeal movable effects by a real delivery, is not subject to any formality." A donor gave his check, payable to his donee, who, on the same day drew the money named therein on presentation to the drawee; it was held that the gift was perfect, and was not revoked by the death of the donor a day or two thereafter." "An actual, real delivery of a corporeal movable effect (money) was made," said the court, "and no other formality was necessary.

¹ *Simmons v. Cincinnati Savings Soc.*, 31 Ohio St. 457; S. C., affirming 6 Amer. L. Rec. 441. The gift in this case was treated as one *inter vivos*, although it might have been deemed one *mortis causa*.

The check was the means or vehicle of delivery.”¹ So, too, if the check has been accepted by the drawee before the death of the drawer it would seem to be a valid gift of the money named therein ; for then the check becomes a contract between the donee and drawee, and the acceptance operates as an assignment of enough of the donor’s funds in the hands of the drawee to satisfy it.² This would be more so the fact if the drawee should have done anything transferring the amount of the check from the drawer’s account to the drawee’s credit before the donor’s and drawer’s death. But if a donor should draw a check in favor of the donee upon a bank where he had no funds, and the bank accept but not pay it before his death, we do not think the donee could enforce its payment, for the reason that the check and its acceptance is based upon no consideration, and there was no delivery of the thing given before the death of the donor. No money, after the donor’s death, could be placed in the bank that would be subject to the check, for such money could not be the money of the donor who, at the time of its receipt by the bank, was dead. The law does not recognize a dead man as the owner of property.³

316. PAYMENT PREVENTED BY DRAWEE UNTIL AFTER THE DONOR’S DEATH.—But a check not paid before the donor’s death may be enforced thereafter, if the payment has been delayed until after such death by an act or the

¹ Succession of De Pouilly, 22 La. Ann. 97.

² Simmons v. Cincinnati Savings Society, *supra*. Only a dictum to this effect occurs in the above case, and we know of no case directly in point. But the rule laid down in the text, it seems to us, is undoubtedly correct in the main.

³ See Bromley v. Brunton, 6 L. R. Eq. 275 ; S. C. 37 L. J. Ch. 902 ; 18 L. T. N. S. 628 ; 16 W. R. 1006, where it was said : “ The gift in this case being made in the form of a check drawn on the bankers of the donor, if there had been no funds in the hands of the bankers, then, of course, there would have been an incompleteness in the gift on the part of the donor.”

fault of the drawee, and without the neglect or laches of the donee. Thus a donor gave a check for £200 on the 14th, and the donee presented it to the drawee bank the next day, but payment was refused for the reason that the signature differed from the usual signature of the donor, and the same refusal was made on the 16th, and on the 17th the donor died, the check not having been paid ; it was held that the donee could enforce a claim for the amount of the check against the executors of the donor, who had drawn the funds from the bank against which the check was drawn, and which were sufficient to satisfy the check at the time of its second presentation. "The reason," said Vice-Chancellor Stuart, "why they did not pay it was one proceeding from their minds—they doubted the authenticity of the donor's signature, and the result is that the funds which the donor had dedicated to the purpose of this gift, through no act of the donor, and through no fault of the donee, came into the hands of the executors of the donor. I conceive that, under these circumstances, no further act was necessary on the part of the donor to make the gift complete. The failure, so far as the gift has failed through non-payment to this time, occurred through the default of third parties, whose duty it was to pay it. The effect of the check was to appropriate so much of the donor's money, and my opinion is that the funds, the subject of the gift, are in the hands of the executors just as much liable to the payment of the check as they were in the hands of the banker." ¹

¹ *Bromley v. Brunton*, 6 L. R. Eq. 275 ; S. C. 37 L. J. Ch. 902 ; 18 L. T. 628 ; 16 W. R. 1006. Where the donor delivered a check to the donee, part of which was to be paid by the donee to B, and the check was cashed before the donor's death, it was held that B could hold the donee as trustee for the part due him, although he knew nothing of the gift until after the donor's death : *Tate v. Leithead*, Kay, 658 ; S. C. 23 L. J. Ch. 736. So where a donor executed a letter of attorney to transfer a savings bank loan and handed it, with the certificate of the loan, to C, with instructions to sell the loan, pay certain charitable legacies with the pro-

317. CHECK OF THIRD PERSON.—A check payable to the donor or bearer is capable of being made a gift *inter vivos* or *mortis causa*. In such a case the mere delivery, accompanied by words of gift is sufficient ; and if either a gift *inter vivos* or *mortis causa* it need not be presented for payment until after the death of the donor.¹ In a Louisiana case it was said : “ But the check in question was not of Hampton Elliott’s [the donor] drawing. It was a check drawn to his order. The moment he indorsed it and handed it over to Mrs. Risley [the donee], his property in it ceased. It was not his money which the bank paid when it paid the check. It was Bretton & Kountz’s [the drawers’] money. The bank paid under instructions from them and not under any mandate from Elliott. A check is not an obligation. It is an unconditional order to pay. It, in fact, represents money, and to all practical intents is money. When, therefore, Elliott gave the check in question, indorsed by him, to Mrs. Risley, it was money which he gave her, and which she reduced to her possession when she took it.”² But in all such instances there must be a complete delivery of the check. Thus where a father took a check he had received in payment of a mortgage and said to his wife “ I give this to baby ; it is for himself, and I am going to put it away for him, and will give him a great deal more along with it ;” and he then put the check into the baby’s hand (who was only nine months old), and then took it back for the purpose of locking it in his safe, and did so ; and on the succeeding day he told his solicitor he in-

ceeds, and have the remainder set-off to B as a gift ; and C sold the loan, receiving in payment a check drawn to B’s order, which he retained until the donor’s death ; it was held that there was a completed gift during the lifetime of the donor : *McGlade’s Appeal*, 99 Pa. St. 338.

¹ *Rhodes v. Childs*, 64 Pa. St. 18 ; *Gourley v. Linsenbigler*, 51 Pa. St. 345.

² *Burke v. Bishop*, 27 La. Ann. 465 ; S. C. 21 Amer. Rep. 567.

tended to add £100 to it, and invest it for the infant; and within a week said to the same solicitor that he was coming to his office to alter his will, that he might take care of his child, but did not do so, dying within a few days; it was held that there was no gift, nor was there a declaration of trust binding upon him and his estate.¹ But where property was the subject of the gift, and was sold by the person into whose hands it was delivered with instructions to sell it and pay a part over to the donee; and such person did sell it, and received a check in payment, payable to the donor's order, which was not cashed until after such donor's death, it was held that there was a valid gift entitling the donee to the proceeds of the check.²

318. RIGHTS OF BONA FIDE HOLDERS OF CHECK GIVEN INTER VIVOS INDORSED BUT NOT CASHED BEFORE DONOR'S DEATH.—Suppose a check is given and the donee indorses it for value, before the death of the donor, and it, in the usual course of business, does not reach the drawee until after the death of the donor; or suppose the indorsee has been guilty of delay (laches, if you please), in presenting it for payment; or that it is an old check when indorsed; or that the indorsee knew at the time of indorsement to him by the donee that it was a gift; or, lastly, that he knew it was a gift but an intermediate indorsee did not have such knowledge and took it for value in the usual course of business, what is the holder's rights? It is easier to ask these questions than to answer them. They have, however, been in part

¹ *Jones v. Lock*, 1 L. R. Ch. Div. 25; S. C. 35 L. J. Ch. 117; 11 Jur. N. S. 913; *Reddel v. Dobree*, 10 Sim. 244.

² *McGlade's Appeal*, 99 Pa. St. 338. In England a check payable to the donor may be the subject of a gift, although the donor fail to assign it to donee: *Clement v. Chesseman*, 27 Ch. Div. 631; S. C. 54 L. J. Ch. 158; 33 W. R. 40.

answered by the courts. An English testator left England in October, 1871, and went to San Remo, Italy. On the 5th of December following, after he had been informed that he could live only a few hours, he drew a check on his London bankers, payable to his wife or order, for £100, and presented it to her as a gift. He recovered from the immediate attack; but on February 2d, 1872, was again in a very weak and sinking condition. On the morning of that day, at his direction, a friend drew a check for £250, and the testator signed and gave it to his wife as a gift. These were gifts *mortis causa*. His wife, during the donor's lifetime, indorsed the checks to bankers at San Remo, or to their order, and they were at once paid into their bank. The testator died five days after he drew the last check. The indorsees of the donee subsequently indorsed the checks to other persons, and negotiated them in the ordinary course of business. After the death of the donor, the donee drew out the amount of her credit at the bankers, given by reason of the deposit of the checks. In six and eight days, respectively, the two checks were presented by London bankers, who had received them in due course of business without any knowledge of the drawer's death, to the drawee bank for payment, which was refused on account of the death of the donor. Thereupon the donee was compelled to take up the checks; and, after this payment, she filed a claim against the executors of the estate of the donor to recover the amount named therein. It was held that she could recover. "The result of the authorities," said the court, "appears to be that a gift of a bill of exchange, which is by its very nature payable at a future day, may be a good *donatio mortis causa*, but the gift of a cheque is not valid unless it is presented for payment or paid before the death of the donor. I am satisfied that the object of

this testator was to give these cheques to his wife. Therefore, I think I ought to do all I can to make the gift good. Now I can really see no reason why if a bill drawn on a goldsmith would be a good *donatis mortis causa* a cheque should not be so too?¹ A distinction has, however, been drawn between the case of a bill of exchange and that of a cheque payable to bearer, and if these cheques had been payable to bearer and had not been presented for payment at the bank on which they were drawn before the donor's death, I should probably have considered that I was bound to hold that there was not a good gift. But these are cheques payable to order; and it is clear that the testator knew that they could not be presented for payment either on the day they were drawn or the subsequent day. I must attribute to him the knowledge that the cheques would not be paid for some time, and on that ground I come to the conclusion that this case differs from the other cases of cheques. But I have also the decision of Lord Loughborough.² He says: 'If she had paid this away either for valuable consideration or in discharging a debt of her own, it would have been good; or even if she had received it immediately after the death of the testator, before the banker was apprised of it, I am inclined to think no court would have taken it from her.' In this case I have the very distinction thus pointed out by Lord Loughborough. Mrs. Pearce [the donee] did pay away the proceeds of the cheque, and it would seem, amongst the husband's creditors. And I think that when a man gives his wife a cheque it is in substance as complete a gift as if he had handed her the cash." The court then points out the discrepancy in the two reports of the case quoted

¹ Evidently referring to *Lawson v. Lawson*, 1 P. Wms. 441.

² In *Tate v. Gilbert*, 2 Ves. 111; S. C. 4 Brown Ch. 286.

from, and says: "If there is any real discrepancy, I think that the report in *Vesey* is probably the more accurate, and that it was intended to be held that an actual dealing for value with a note would complete the gift as a valid *donatio mortis causa*."¹ If the indorsees had seen fit to proceed against the executors of the donor, there is no doubt that the result would have been the same—they would have recovered. But this was a case of unusual circumstances. Emphasis is laid upon the fact that the testator knew it would be some time before the checks could reach the bank upon which they were drawn; but still it cannot be well seen how this could have any effect in determining whether the gift was or was not a completed one. For in every case of *donatio mortis causa* where it is incomplete only because of a lack of sufficient delivery, the intention of the donor is clearly made out, yet that cannot be used to bridge over the absence of a delivery. The turning point in the case is that the checks had been negotiated for value before the death of the donor, and the indorsees, without notice of the circumstances under which they were given, had a right to insist upon the validity of the checks and their right to recover of the testator's estate the face of such checks. They undoubtedly stood upon the same plane as bills of exchange drawn by the donor in favor of the donee, and indorsed by her for value before his death. Under such circumstances, in the case of bills of exchange, the holder, for value, even if the payee, may enforce the bills against the drawee accepting them after the known or unknown death of the drawee;² and there is one distinction, in principle, between a case of a check and one of a bill of

¹ *Rolls v. Pearce*, 5 Ch. Div. 730; S. C. 46 L. J. Ch. 791; 36 L. T. 438; 25 W. R. 899; 22 Moak. 432.

² *Cutts v. Perkins*, 12 Mass. 206; *Billing v. Devaux*, 3 Man. & Gr. 565; *Hammonds v. Barclay*, 2 East. 227, 235, 236.

exchange, although the courts, where the payee of the check is the holder have dogmatically followed the dictum of Chancellor Loughborough in *Tate v. Gilbert*, to the effect that the demise of the drawer of a check revokes the authority of the drawee to pay it after notice of his death.¹

319. DONOR'S CHECK NOT VALID AS A DONATIO MORTIS CAUSA.—In Georgia a donor, when knowingly near his death, executed a check payable to the claimant and had it placed with his will. It was clearly his intention that the claimant should have the sum named in the check. After his death the claimant, the payee, made a demand upon the executors for the check and on refusal brought an action to recover it. A right to recover was denied because there had been no delivery of the thing given.² A like result was reached where the check was delivered to the payee but not presented until after the death of the drawer. The check was drawn at night, as a *donatio mortis causa*, and the donor died before the next day dawned. There was no time to present it at the bank for acceptance or payment. The donor had instructed her solicitor to draw up a deed of settlement, but, perceiving that she could not live until the deed was prepared, she drew the check for the amount to be named in the deed, and directed an application to be made of the proceeds in accordance with the intended provision of the deed. The court held that there was not a gift *mortis causa*.

¹ See an article of John W. Daniels on "The Effect of the Death of the Drawer of a Check:" 3 Vir. L. Jr. 323; S. C. 13 Ir. L. T. 448, *Bankers' Magazine* for 1879, who reaches the conclusion that a holder of a check given for value (but not a donee) may be paid by the drawee after the notice of the drawee's death. See Parsons on N. & B., 287, note b. Mr. Morse reaches a like conclusion: Morse on Banks, sect. 550.

² *McKenzie v. Downing*, 25 Geo. 669. Nothing is said about the right to recover the amount named in the check if it had been delivered.

"A check," said Romilly, M. R., "is nothing more than an order to obtain a certain sum of money, and it makes no difference whether the money is at a banker's or anywhere else. It is an order to deliver the money; and if the order is not acted upon in the lifetime of the person who gives it, it is worth nothing. The testatrix gave the check at night, and she died in the course of the same night before it could be presented. Suppose she had said, 'I have got £600 in my desk; bring it to me, and I will give you the money,' and had died before it was brought to her, that would have been no gift: and the gift of a check is the same thing; it is worth nothing until acted upon, and the authority to act upon it is withdrawn by the donor's death."¹ There are a number of cases to the same effect.² Nor does the fact that the donor delivers his banker's pass-book with the check render the gift valid.³ So, where the donor had taken out a certificate of deposit, "payable to the order of himself on the return of" the "certificate properly indorsed," and he gave a check to the donee running, "Pay to the order of R. K. Smither [the donee] the amount of my deposit, and charge to my account," it was held that there was not a valid gift *mortis causa*, the check not having been presented during the lifetime of the donor.⁴ Nor can it be claimed that the giving of a check works an assignment of the fund before it is accepted by the bank or drawee, so as to render the latter liable.⁵ If a check payable on presen-

¹ *Hewitt v. Kaye*, 6 L. R. Eq. 198; S. C. 37 L. J. Ch. 633; 16 W. R. 835. If presented before the donor's death and accepted or paid it would have been good.

² *Harris v. Clark*, 3 N. Y. 93; S. C. 51 Am. Dec. 352; *Drewe-Mercer v. Drewe-Mercer*, 6 T. L. R. 95.

³ *Beak v. Beak*, 13 L. R. Eq. 489; S. C. 4 L. J. Ch. 470; 26 L. T. 281.

⁴ *Smither v. Smither*, 30 Hun, 632.

⁵ *Second Nat. Bank v. Williams*, 13 Mich. 282.

tation is not a good *donatio mortis causa*, much less so is one payable in the future where the donor dies before it is payable;¹ nor is a check delivered to a third person as trustee of the donee, payable, by its express terms, a certain length of time after the death of the donor.² A donor held a banker's deposit note for £2,700. In his last sickness, two days before his death, he expressed a desire to give his wife £500 of the £2,700; and at his request a friend filled up a seven days' notice to the bank to withdraw the deposit, and the donor signed it. Afterward the donor signed a form of check, which was on the back of the note, "Pay self or bearer £500," and gave the note to his wife. Before the expiration of the seven days the donor died. When a customer withdrew part of a sum which he had placed on deposit, the practice of the bank was to give him a fresh note for the balance. In an action against the executors of the donor brought by the wife to recover the £500, it was decided that there was no valid gift *mortis causa*; while it was admitted that a banker's deposit note was the subject of such a gift, yet the giving of the check, which was payable only at the end of the seven days' notice, taken in connection with the custom of the bank, did not make the note or any part of it the subject of a gift, for such was not the intention of the donor. The delivery of the note was not made with the intention of giving either it or the money to the wife. "The intention was to deliver the cheque, and, according to the authorities, that is not a good *donatio mortis causa*."³ So where the donor gave his check to an agent with directions to deliver it to the donee after the donor's death from

¹ Curry v. Powers, 70 N. Y. 212; S. C. 26 Am. Rep. 577.

² Waynesburg College, Appeal of, 111 Pa. St. 130; S. C. 32 Pitts. L. Jr. 437.

³ Austin v. Mead, 15 Ch. Div. 651; S. C. 50 L. J. Ch. 30; 43 L. T. 117; 28 W. R. 891. See Duffin v. Duffin, 44 Ch. Div. 76; S. C. 59 L. J. Ch. 420; 62 L. T. 614; 33 W. R. 369; 6 T. L. R. 204.

his present sickness, but if he should recover then to return it, it was held to be an incomplete gift, even though the donor died.¹ An early case in England has been the subject of much discussion. A husband gave his wife, while on his death-bed, £100 in gold, in hand delivered, and drew a bill on his goldsmith to pay his wife another £100, *for mourning* and to maintain her until her life-rent (meaning her jointure) should become due. Seventeen days thereafter he died. The gift of the bill was held good, although not paid until after the donor's death, upon the ground that it operated as an appointment, being a direction to his testators to pay it to the use of his wife, and being for mourning chiefly it might operate like a direction given by the testator touching his funeral, which ought to be observed, though not in the will.² This case has been frequently distinguished, and is said to be obscurely reported, because of its special circumstances; and in the light of modern cases it cannot be supported upon any other ground. The bill on the goldsmith was nothing more than the modern check on a bank; for then (1718) the goldsmiths were the bankers of England.³

320. CHECK OF STRANGER THE SUBJECT OF A GIFT MORTIS CAUSA.—While the donor cannot make a valid gift *mortis causa* of his own check yet he may of an undorsed check payable to himself and drawn by a stranger, just as he may a note payable to himself. Of course the same is true of a gift *inter vivos*.⁴

¹ *Walter v. Ford*, 74 Mo. 195.

² *Lawson v. Lawson*, 1 P. Wms. 441.

³ See the comments on the case in *Tate v. Hilbert*, 2 Ves. Jr. 111; and in *Harris v. Clark*, 3 N. Y. 93; S. C. 51 Am. Dec. 352.

⁴ *Clement v. Cheesman*, 27 L. R. Ch. Div. 631; S. C. 54 L. J. Ch. Div. 158; 33 W. R. 40; *McGlade's Appeal*, 99 Pa. St. 338.

321. NO INTENTION TO GIVE PROCEEDS OF A CHECK.

—In order to make the proceeds of a check a valid gift, although the amount named therein may be reduced to actual possession by the alleged donee, there must be an actual intent to give that amount. Thus where a wife held a legacy to her separate use, and received an uncrossed country banker's draft, payable in London, for the amount, less the legacy duty, and she indorsed the draft and handed it over to her husband, and his banker received the amount and placed it by his directions to his deposit account; and the wife deposed that she never intended to make a gift of the draft to her husband, but that her husband declined to have the money settled upon himself, although he made no objection when she said that "she would like to be able to will it away," it was held that there was no gift of the money by her to her husband, and that she, after his death, was entitled to it.¹

322. DONOR'S CHECK EXCHANGED FOR A STRANGER'S CHECK.—On his death-bed the donor gave his wife a check, saying "she would want money before his affairs were wound up, and that the gift was to be for her sole use, besides what she should receive from his estate." The check was crossed, and for that reason it was some days after the delivery exchanged for a friend's check of the same amount, in favor of the wife. The donor stated to this friend that he desired to give his (the friend's) check to her, and she received and kept it until her husband's death. Before the donor's death his check was paid by the bank, but the friend's check, which was post-dated and also crossed, was exchanged for another, and was duly paid after the donor's death. It was contended

¹ *Green v. Carlill*, 4 Ch. Div. 882; S. C. 46 L. J. Ch. 477.

that there was no valid gift, but the court decided that there was, and that the money given formed no part of the donor's estate. The gift was deemed a gift *mortis causa*.¹

BANK DEPOSITS.

323. CERTIFICATE OF DEPOSIT—DELIVERY.—A certificate of deposit payable to the order of the depositor or to the bearer² is the subject of a gift, either *inter vivos* or *mortis causa*. It is nothing more than the obligation of the bank to pay the sum of money named therein on presentation of the certificate properly indorsed, when payable to the order of the depositor, or to bearer when so payable. Indeed, it is nothing more than the note or bond of the bank for the payment of a sum of money on demand; and whether indorsed or not by the depositor it is capable, in equity, of being enforced as a gift, like any chose in action, where there has been a complete gift of the certificate. The gift may even be of a part of a certificate, if there is a sufficient delivery. But where A and B, two brothers, had been engaged in business, and A, during his last illness, sent for his counsel to draw his will; and upon its execution produced a certificate of deposit, saying that he had never settled with his brother in their business relations, and expressing a desire to assign him a part of the deposit; and thereupon, at his request, his counsel wrote out an assignment, on the back thereof, of the certificate, which he signed and handed it back, accompanied with the remark that "he should take it with him and put it in his safe; and that it was for B;" and his counsel took and locked it up in his [the counsel's] safe as requested, and retained it until after A's death, which

¹ *Bouts v. Ellis*, 17 Beav. 121; affirmed 4 De G., M. & G. 249; S. C. 17 Jur. 585.

² *Brooks v. Brooks*, 12 S. C. 422.

took place several months later; it was held that the gift was incomplete for want of a delivery to the donee, or to some one for his use. The person to whose hands it was intrusted was only the agent of the donor, and he had no instructions to deliver it to the donee. The gift was also incomplete for want of an acceptance by the donee during the life of the donor. Therefore, in an action against the estate for the amount assigned the defendant had the judgment.¹ But where the donor delivered to the donee, three hours before his death, a deposit note, and the donee took and kept it, it was held to be a valid gift *mortis causa*.² If, however, the certificate of deposit is so indorsed as to limit and restrain the authority of the donee in the collection of the money, so as to forbid its payment until the donor's death, it is not valid as a *donatio mortis causa*.³

¹ Scott v. Lauman, 104 Pa. St. 593.

² Amis v. Witt, 33 Beav. 619; but nothing is said in the opinion concerning the note, allusion being made only to a policy of insurance given at the same time, and held to be a valid gift: 101 E. C. L. (1 B. & S.) 169. If the donee draw at once the money on the deposit note he will have to return it if the donor recovers: Moore v. Moore, 18 L. R. Eq. 474; S. C. 43 L. J. Ch. 617; 22 W. R. 729; 30 L. T. N. S. 752. See Dunne v. Boyd, 8 Ir. Eq. Rep. 609, where it was assumed that a deposit note could be the subject of a valid gift *mortis causa*: Conner v. Root, 11 Colo. 183 (note undorsed, but a valid gift); McCabe's Case, 6 Pa. C. C. 42; Westerlo v. De Witt, 36 N. Y. 341; S. C. 93 Am. Dec. 517; Harris v. Clark, 3 N. Y. 93; S. C. 51 Am. Dec. 352. *Contra*, McCabe v. Robertson, 18 C. P. U. C. 471; Lee v. Bank, 30 C. P. U. C. 255; *Ex parte* Gerow, 10 N. B. 512; Moore v. Ulster Bank, 11 Ir. C. L. 512 (1877); Hunter v. Wallace, 14 U. C. Q. B. 205; S. C. 13 U. C. Q. B. 385.

³ Basket v. Hassell, 107 U. S. 602; S. C. affirming 6 Repr. 609; 8 Biss. 363. Same case on second appeal, 108 U. S. 267; M'Nicol v. M'Dougal, 17 C. of S. Cas. 25; Morrison v. Forbes, 17 C. of S. Cas. 958. A deposit receipt, in the ordinary form, may be the subject of a *donatio mortis causa*, although the receipt is expressed not to be transferable: Cassidy v. Belfast Banking Company, 22 L. R. Ir. 68.

A, in his last sickness, showed a deposit note to his daughter, and told her that it belonged to her if he died. She took it, and, by his directions, placed it for safe custody in a cash-box which was kept in his bed-room, but of which she had the key, and to which she resorted for household purposes. It was held that this was a good *donatio mortis causa*: Taylor v. Taylor, 56 L. J. Ch. 597. See Farman

324. MONEY DEPOSITED IN NAME OF DONEE.—Many cases have arisen where the owner of money has deposited money in bank to the credit of a third person. Such a deposit may or may not be a gift, according to the circumstances of each particular case. Thus where the donor, in the presence of the donee, his daughter, deposited money in a bank for the latter's personal and specific use, in her name, and afterward made like deposits in a trust company in her name, though not in her presence; and then several deposits in such company were entered in a pass-book supplied by the company, which he delivered to her; and she drew out the amount deposited in the bank and placed it to her credit in the trust company, thus forming part of the whole amount to her credit therein, it was held that there was not only a perfect gift of the funds in the bank, but also of those in the trust company. "There was nothing more," said the court, "that could have been done in order to clothe the donee with the absolute and full title and control of the moneys thus deposited, and nothing more was necessary to complete a valid and irrevocable gift."¹

325. SAME CONTINUED—REVOCATION—ESTOPPEL.—A donor made a deposit in the name of the donee, a minor, naming her mother as guardian. At the same time she informed the guardian that she had put the money in the bank for the donee. A bank-book was delivered to the donor by the bank with the deposit so entered upon it, but she retained possession of it, and afterward had the money transferred back to her by the guardian. This was held to be a valid gift, and irrevoc-

v. Smith, 57 L. J. Ch. 637; S. C. 58 L. T. 12; *Duffin v. Duffin*, 44 Ch. Div. 76; S. C. 59 L. J. Ch. 420; 62 L. T. 614; 38 W. R. 369; 6 T. L. R. 204 (check given along with deposit note, held not to vitiate gift).

¹ *Crawford*, Matter of, 113 N. Y. 560; *Beaver v. Beaver*, 32 N. E. Rep. 998.

cable.¹ So in the same State A deposited in a savings bank \$250 in her own name as trustee for W, who was a boy only thirteen years of age. His parents were near neighbors and friends of A, and he was accustomed to do errands for her, being almost daily at her house for that purpose. She often gave him presents in return for his services. Shortly after making the deposit she told the boy's parents she had deposited that amount in the book for W, and again alluding to it said he would need it for his education. She kept the book, and two years after drew out a part of the money, and a year later the remainder with accrued interest, signing receipts in her own name, and appropriating the money to her own use. Six years after the deposit she died, leaving a will in which no allusion was made to the deposit, nor to W. In a contest over this sum it was decided that a valid gift had been made, a trust created at the time of the deposit, not revocable; and that the title to the money vested in W at his majority, if not sooner (when he needed it for his education); and it was intimated that the title vested in him when A drew it out of the bank.² During his lifetime a father deposited money in a savings institution to the credit and in the name of his son. He had been accustomed to stop with B; and about two weeks before his death, then being seventy-three years of age, as he was leaving B's house he complained of his health and said he could not live long. He further said, on leaving with B the box containing the bank-book, that he intended that for his son and that B must let no other person have it, "except there was five dollars for S." To another witness he said that he had money in bank for his son, and the reason why he had done so was because

¹ *Kerrigan v. Rautigan*, 43 Conn. 17.

² *Minor v. Rogers*, 40 Conn. 512.

he had given a farm to M, and W did not like the donee; that he had done this for the rest of his children, and never had done anything for the donee. The key to the trunk which contained the bank-book was found in the pocket-book of the donor after his death. In an action by the son to recover the funds drawn from the savings institution by the administrator of the father, it was held that the gift was a valid gift *mortis causa*.¹ A husband deposited his own money in a bank to the credit of his wife, saying to the cashier that the money was his, and that he would let the amount rest in that way for a short time. The wife was sick and the deposit was made to please and appease her. She drew checks upon this account, which were paid. The wife dying, the cashier agreed that the husband should draw out the remainder. He did so, but it was held that the cashier could make no such an agreement that would estop a receiver of the bank from insisting that the money belonged to his wife's administrators. It was decided that there was a valid gift.²

326. ACCEPTANCE OF DEPOSIT—DONEE HAVING NO KNOWLEDGE OF IT—DONOR RETAINING CONTROL OVER DEPOSIT.—In the foregoing cases the donee had knowledge of and had expressly or tacitly accepted the deposit as a gift. Acceptance of the benefit of the deposit is essential to make a gift complete. Thus where a husband deposited money in his wife's name in a bank, and it was so charged upon the books of the bank and upon a pass-book given to him, but there was no evidence that she had any knowledge of the deposit until after her husband had drawn it out, it was decided that she could not recover the

¹ *Vandermark v. Vandermark*, 55 How. Pr. 408.

² *The People v. State Bank*, 36 Hun, 607.

amount of the deposit from the bank. "A mere deposit," said the court, "of the property by the depositor, in the name of another, with a third person, will not of itself be sufficient to pass the title. The act is one entirely between the depositor and the bailee, to which the person in whose name the deposit is made is in no way a party. It would, *of itself*, no more pass title than would the execution of a deed by a person, and the placing it on record by him, without the knowledge or consent, express or implied, of the person named as grantee."¹ It will be observed that in this case the depositor never lost dominion over the fund, but the court does not seem to place special emphasis upon this fact. In New York, however, this was regarded as a turning point in the case. There a father caused the bank to open an account with his young children, and transferred various amounts to it. After the transfer had been made, the father continued to exercise control over the several accounts, and the bank recognized him in that connection. It did not appear that the father was indebted to the children, or that he had ever received any consideration for the transfer of the credits, or that the children had notice thereof. In an action by the father against the bank for the amount of these several accounts, especial emphasis was laid upon the fact that he had never parted with his dominion and control over the funds, which was essential to a perfect gift, which control the bank could not dispute after so long recognizing it. Nothing of moment was said about the children having accepted the gift; for, possibly, the law would presume an acceptance by them, if that were the only thing lacking to complete the gift.² But

¹ *Branch v. Dawson*, 36 Minn. 193. See also, *Gaskell v. Gaskell*, 2 Y. & J. 501, and *Taylor v. Henry* 48 Md. 550; S. C. 30 Am. Rep. 486.

² *Geary v. Page*, 9 Bosw. 290.

where a donor deposited money in a savings bank (and this bank deposit seems to have been nothing more than a deposit in an ordinary bank of deposit) in trust in the name of the donee, taking out a pass-book in the donee's name, and after the death of both the donor and donee it not appearing that either the donor made any claim to the fund or that the donee ever knew of it, in an action between the executors of the donor and that of the donee, the fund was awarded to the latter, upon the theory that there was a valid gift.¹

327. GIFT OF BANK-BOOK DOES NOT PASS THE DEPOSIT.—A bank-book, in which is noted the various amounts deposited by the holder of it, is nothing more than evidence of the fact and amount due from the bank to the depositor. It does not contain and is not the contract between the bank and the depositor. It is in no way a deposit note. Therefore the gift of his deposit-book by the donor, even of a savings bank, where it is similar to the pass-book of an ordinary depositing book, does not make a valid gift of the money deposited in the bank and of which the pass-book may serve as evidence of the debt due to the depositor.²

328. WIFE RETAINING AFTER MARRIAGE MONEY SHE HAD ON DEPOSIT—HUSBAND AS TRUSTEE.—One Whitehead married a Miss Milner, who owned real estate and had £1,400 in bank. Previous to the marriage Mr. Whitehead regarded the possession of Miss Milner a sufficient fortune for this world, and very generously agreed

¹ *Millspaugh v. Putnan*, 16 Abb. Pr. 380. It does not appear from the report how long before the death of either the donor or donee the gift had been made.

² *M'Gonnell v. Murray*, 3 Ir. Eq. Rep. 460; *Ashbrook v. Ryon*, 2 Bush. 228; *Thomas v. Lewis*, 15 S. E. Rep. 389.

with her, before the bonds of matrimony had molded them into one legal individual, in accordance with the provisions of the common law which we have always been absurdly taught by the old legal luminaries to admire as the pinnacle of legal wisdom, that she should hold after the marriage, her real estate and money then possessed by her as her separate estate. The real estate was so settled ; but nothing was done with the £1,400, except to leave it in the bank where she as a maiden had deposited it. The bank took no notice of her marriage ; and so far as it was concerned, she was still a maiden, for they let her take out £50, and with the knowledge and consent of her husband she drew the interest due upon the deposit for two years. But the course of matrimony did not run smoothly with Mr. and Mrs. Whitehead, and they “agreed to disagree,” sealed a verdict to that effect and separated. Then it was that Mr. Whitehead thought of the £1,350 in bank, and called upon his solicitor to know “his rights.” That legal luminary was so hard-hearted as to at once inform him that when a man and woman marries, all her personal property, in accordance with the much revered common law, became his ; and seizing his cane and hat, he quickly reached the bank and served notice upon them not to let Mrs. Whitehead have the £1,350. But Mrs. Whitehead had apparently not consulted an attorney, and had gone, in accordance with her feminine promptings and instincts of justice, and drew out the £1,350 before the legal luminary reached the bank ; and so the latter was informed, much to his chagrin, that such was the case when he served the aforesaid notice. Apparently Mr. Whitehead could not get along without the rent of his wife’s estate and the interest of her money ; for in twenty months he made an assignment of his property to pay his creditors, and his hard-headed trustee sought to recover

the £1,350. In vain was it urged before stern Justice Cave that the husband had agreed that this money should be hers and not his; but the statute of frauds served the husband, and the trustee for the moment got the money. But when all things else fail, an appeal to a higher court was left; and so appealed Mrs. Whitehead. And here she won; for the court said the statute of frauds had nothing to do with the case, and that it was very clear after the marriage Mr. Whitehead had given the £1,400 to his wife for her separate use, and that he had made himself a trustee of it for her. Thus it was that Mr. Whitehead had made a gift to his wife but didn't believe it.¹ But in Pennsylvania a poor woman in a somewhat similar case lost her earnings, although deposited in a savings bank in her own name.²

SAVINGS BANK DEPOSITS.

329. DEPOSIT IN SAVINGS BANK IN DONEE'S NAME—GIFT INTER VIVOS—PRESUMPTION OF ACCEPTANCE.—The subject of gifts of deposits in savings banks has been one calling for many decisions. More cases have arisen with respect to such gifts than with respect to deposits in ordinary banks of deposits. As will hereafter be seen, some of these cases rest upon the same ground that cases with respect to ordinary deposits do, while others turn upon the statute law peculiarly applicable to savings banks, or upon by-laws adopted by the particular bank in question. Illustrations of these will be given in the following pages. A strong case of this kind occurred in Vermont. There A deposited \$220 of her own money in a savings bank, in the name of B, and took out a deposit-book,

¹ *Ex parte Whitehead*, 14 L. R. Q. B. Div. 419; S. C. 54 L. J. Q. B. Div. 240; 52 L. T. (N. S.) 597; 33 W. R. 471; 49 J. P. 405; reversing 54 L. J. Q. B. Div. 88; S. C. 52 L. T. (N. S.) 265; 33 W. R. 230.

² *McDermott's Appeal*, 106 Pa. St. 358.

in which was entered, by the treasurer of the bank, the following memorandum: "1864, No. 530, B deposited \$220." At the time of the deposit, the treasurer entered in the bank-books this memorandum in the identical language used in the deposit-book, pursuant to the by-laws of the institution. A retained the bank-book until her death, which occurred several months after B's. It did not appear that B ever knew of the deposit. A by-law of the bank provided that deposits should be entered in the treasurer's books and duplicates given to each depositor; and by the act of depositing the depositor was to be taken and deemed as assenting to the binding effect of all by-laws and regulations of the bank. Another by-law provided that "any depositor may designate, at the time of making his deposit, the period for which the same shall remain in the institution and the person for whose benefit the same is made; and such depositor, and his or her legal representative, shall be bound by such condition by him or her voluntarily annexed to such deposit, and in case of the dissolution of the corporation the same shall be paid to such person as may be legally entitled thereto." But the court deemed that these provisions had nothing to do with the case for the reason that both the depositor and the bank treated the money as belonging to B. It also held that the money deposited belonged to B, that the bank had a right to so regard it, and that the transaction amounted to an agreement between the bank and B, by force of which it became accountable to B and to no other person; that B thereby became bound by the by-laws, and A had no power to withdraw the deposit. The article quoted was deemed to apply only to a person depositing money in his own name for the benefit of some third person; in which event the depositor would be bound by the condition annexed to the deposit. Another

article of the by-laws required that, when any person should receive either the principal or interest, he should produce his original deposit-book and have entered therein the fact of the payment, except in case of sickness or absence, when it could be paid upon his written order accompanied by the book. Still another article recited that, "as the officers of this bank may be unable to identify every depositor transacting business at the office, the institution will not be responsible for loss sustained when a depositor has not given notice of his book being lost or stolen, if such book be paid in whole or in part on presentation." It was insisted that the retention of the book, which was evidence of the deposit, by A, showed that the gift was never perfected; for B could not draw the money, not being able to produce the deposit-book. But the court did not think so, for, it said, the entry in the bank-books, which was a duplicate of that in the deposit-book, was also evidence of the deposit of as high order as that of the treasurer's books; but if the argument were sound, then no depositor could draw out his deposit if he had lost his deposit-book, which would work a manifest injury to depositors so situated. But, said the court, the mere possession of the deposit-book by A did not give her the right to draw the money, and that very book showed an ownership in B. The article with respect to the deposit-book gave no right to the depositor in addition to those given by the article requiring the production of the book or a written order of the depositor; and A could not draw the money without such an order from B. The article respecting the loss of the book was for the protection of the bank and not a measure in favor of the depositor. It was still farther claimed that there was no evidence that B ever knew of the gift, but to this claim the court said that the presumption was that she did have knowl-

edge of it; and the fact that the donor lived several months after the donee's death, and there was no evidence to show that the former ever asserted any claim to the money after the latter's death, tended, said the court, to prove that the donor, after the donee's death, regarded the deposit as a part of the estate of the donee.¹

330. GIFT OF DEPOSIT-BOOK OF A SAVINGS BANK IS A GIFT OF THE FUND.—We have already seen that a gift of an ordinary pass or deposit-book of a deposit bank does not pass the title to the fund in the bank; for the book is only evidence of the depositor's title to the fund and not the fund itself. How is it with a savings bank deposit-book? This question has been variously answered. Thus where a depositor in a savings bank delivered her deposit-book, representing deposits in the bank, to a donee, accompanied by proper words of gift, it was held that there was a valid gift, although the book was not assigned in writing, and, by the rules of the bank, the moneys could only be drawn or transferred by the depositor or his administrator, or by some person presenting the book with an order signed by the depositor in the presence of attesting witnesses.² The donee acquired an equitable title to the fund.³ Such a gift may be valid as a *mortis causa*.⁴ Thus where the donor, four days before her death, took a key from her bureau drawer, unlocked her trunk and took out her savings bank-book, and said to the donee: "Now keep this and if anything happens to me, bury me

¹ Howard v. Windham Co. Savings Bank, 40 Vt. 597.

² Hill v. Stevenson, 63 Me. 364; S. C. 18 Am. Rep. 231; Augusta Savings Bank v. Fogg, 82 Me. 538; Bourne v. Stevenson, 58 Me. 499; Ridden v. Thrall, 125 N. Y. 572.

³ Camp's Appeal, 36 Conn. 88; S. C. 4 Amer. Rep. 39.

⁴ Tillinghast v. Wheaton, 8 R. I. 536; S. C. 5 Am. Rep. 621; Curtis v. Portland Savings Bank, 77 Me. 151; S. C. 52 Am. Rep. 750; Alsop v. Southold Savings Bank, 21 N. Y. Supp. 300.

decently and put a headstone over me, and anything that is left is yours." This was held to be a valid *donatio mortis causa* of the funds.¹ So where A, on going away, with no expectation of returning, gave B a trunk and what was in it; and he went away but returned in a few days and occupied the room he had before his departure, in which the trunk had been when given and from which it had never been removed; and he soon died in that room, the trunk never having been removed; and in the trunk was a deposit-book of a savings bank in favor of the donor, it was held that this was a valid gift of the bank-book and deposit as a gift *inter vivos*.² Speaking of the legal effect of the possession of a pass or deposit-book, the Supreme Court of Massachusetts said: "The book is the instrument by which alone the money can be obtained, and its possession is thus some evidence of title in the person presenting it at the bank. It is in the nature of a security for the payment of money, it discloses the existence and amount of the fund to the person receiving it, and affords him the means of obtaining possession of the same. We can have no doubt that a purchaser, to whom such a book is delivered without assignment, obtains an equitable title to the fund it represents; and a title by gift, when the claims of creditors do not affect its validity, stands on the same footing as a title by sale." Consequently it was held that the bare delivery of a deposit-book of a savings bank, with the intention of making a gift of the deposit fund represented by it, even without an assignment, was a good gift; and the donee could sue in the name of the donor's administrator without his consent, to recover the fund.³ This is espe-

¹ *Curtis v. Portland Savings Bank*, *supra*.

² *Penfield v. Thayer*, 2 E. D. Smith, 305.

³ *Pierce v. Boston Five Cents Savings Bank*, 129 Mass. 425.

cially true where a written order accompanies the delivery of the pass-book for the payment of the fund; and in such a case it was held that the declarations of the donor, made at the time of the delivery, tending to show that no gift was intended, were not admissible to overthrow the gift or to contradict the effect of the written order and acts of delivery.¹ And where the person receiving the assignment, orally agreed that he would draw for the donor what money she wanted during her lifetime, and pay whatever was left to her son at her death, it was decided to be a valid gift.² So where A, in contemplation of death, gave to B a sealed package, informing him that it contained money and savings bank-books, instructing him what to do with the property at his death; and after A's death B opened the package and found a sum of money in it and certain savings bank-books, with a writing signed by A, stating where he wished to be buried, and whatever was left, besides paying all bills and expenses, was to be divided among certain persons named, it was held that there was a valid gift *mortis causa* to B, in trust for the persons named in the paper.³ But where A gave written directions to B, who had charge of the funds standing in A's name in a savings bank, to draw from the bank a certain sum and give it to C; and B, after the paper was presented to him, declined to draw the money, although afterward verbally requested by A to do so; and B, on becoming A's executor, again, on C's request, declined to draw the money, it was held that there was no gift and B could not maintain an action for the sum intended for him. There was only an intent to make a gift, not a gift

¹ Kimball v. Leland, 110 Mass. 325; Foss v. Lowell, etc., Bank, 111 Mass. 285; Sheedy v. Roach, 124 Mass. 472; S. C. 26 Am. Rep. 680.

² Davis v. Ney, 125 Mass. 590

³ Pierce v. Boston Five Cents Savings Bank, 129 Mass. 425.

perfected.¹ So in Pennsylvania where a rule of the savings fund society, known to depositors, provided that no transfer or assignment of the deposit-book or the money of a depositor would be acknowledged, but the treasurer might, in his discretion, allow money to be paid on a depositor's check; and a depositor, in expectation of death, handed her deposit-book to a friend, saying: "The money there is for my sister in Ireland, but if I don't die I want it back," and died the next day, it was held that there was no valid gift of the money, the book being treated as the pass-book of an ordinary bank of deposit.²

331. DEPOSIT-BOOK OF A SAVINGS BANK MUST BE DELIVERED—ACQUIESCENCE.—To constitute a valid gift the deposit-book of a savings bank must be delivered to the donee, or to some one for him. And so a verbal agreement between husband and wife that moneys deposited in a savings bank in their joint names, and belonging to them jointly, should become, at the death of either, wholly the property of the other, and there was no delivery of the deposit-book, it was held to be neither an executed contract nor a gift *mortis causa*.³ There could be no question that it was not a gift *inter vivos*, for neither contemplated its taking effect until the other's death.⁴

¹ *Gerry v. Howe*, 130 Mass. 350.

² Appeal of Walsh, 122 Pa. St. 177; S. C. 9 Amer St. Rep. 83.

See other cases in *Schollmier v. Schollmier*, 78 Ia. 426; *Ridden v. Thrall*, 55 Hun, 185; S. C. 24 Abb. N. C. 52; affirmed 125 N. Y. 572; *Walsh v. Bowery Savings Bank*, 15 Daly, 403; S. C. 2 City Ct. (N. Y.) 276; *Develin v. Farmer*, 16 Daly, 98; *Miller v. Clark*, 40 Fed. Rep. 15. The holder of a savings bank-book may constitute himself a trustee of the fund: *Beaver v. Beaver*, 117 N. Y. 421; *Atkinson, In re*, 16 R. I. 413; *Buckingham's Appeal*, 60 Conn. 143.

³ *Drew v. Hagerty*, 81 Me. 231; S. C. 10. Am. St. Rep. 255; *Augusta Savings Bank v. Fogg*, 82 Me. 533; in case of infant donee see *Beaver v. Beaver*, 62 Hun, 194.

⁴ Other cases are *Pope v. Burlington Savings Bank*, 56 Vt. 284; S. C. 48 Am. Rep. 781; *Beaver v. Beaver*, 117 N. Y. 421, reversing 53 Hun, 258; *Hoar v. Hoar*,

But where the deposit is in the name of the donee, and it is not subject to the control of the donor, or is accompanied by words constituting it a trust, then a delivery of a deposit or pass-book is not necessary;¹ yet where a niece sent to her uncle at different times money amounting to \$100, and he put it into a savings bank for her, but retained possession of the bank-book. She came to his house, and there was taken sick and died. After she despaired of recovering she said she gave the money to her uncle, and desired that he have it. It did not appear that she delivered the bank-book or anything else to him. It was held that there was no valid gift, and although her father had signed and delivered to her uncle, after her death, a writing to the effect that he was perfectly satisfied with the uncle claiming the money, and that he would make no claim to it, it was held that this was not a valid accord and satisfaction, and he was entitled to claim the money as administrator of his daughter.² But where the donor was sick and at the time gave the donee a written order on the savings bank for the payment to him of a sum of money on deposit in her name, with a memorandum attached that "the book must be sent with this order," and also gave a written order on G, who had the deposit-book, to deliver it to the donee, and the latter presented the order for payment to the bank and was told that it was all right, but no payment could be made to him until he presented the deposit-book, which he did not do until after the donor's death, it was held

5 Redf. 637; *Case v. Dennison*, 9 R. I. 88; *Taylor v. Henry*, 48 Md. 550; S. C. 30 Am. Rep. 486.

¹ *Smith v. Ossipee Valley Savings Bank*, 64 N. H. 228; S. C. 10 Am. St. Rep. 400; *Howard v. Windham Co. Savings Bank*, 40 Vt. 597. See, also, *Beaver v. Beaver*, 62 Hun, 194; S. C. 16 N. Y. Supt. 476.

² *French v. Raymond*, 39 Vt. 623; *Beaver v. Beaver*, 117 N. Y. 421; reversing 53 Hun, 258.

that the gift was incomplete, it not, as one reason, however, appearing that the donor died of the disease he had when he gave the order for payment to the donee.¹ So where a depositor in a savings bank ordered, in 1874, an entry to be made in her account in her deposit-book as follows: "Frank B. Smith, hatter, Danbury, Conn., son of Joseph Smith and Cornelia; to be drawn by Rachel [the donor]; after death, by Frank;" and in a deposit-book in another savings bank held by her, four years previously there had been entered: "This account is in trust for Frank B. Smith," to which she signed her name; but it appeared that she kept the pass-books in her own possession, and drew the dividends, until she became insane, in 1878. It was held that Frank B. Smith, although he knew of these entries during the sanity of the donor, and understood that the funds were deposited in trust for him, was not entitled to be protected against the donor or her guardian drawing the funds from the bank. The court declared that there was no perfected gift.² With intent to make a gift to his two sons, R. and J., C. delivered to each of them a check upon a savings bank, payable four days after his death. He said he desired to retain the control of the money as long as he lived, in order to receive the interest. At the same time he delivered to R. his pass-books, saying they would want them to get the money, he not considering them safe there, and directing R. to take care of them, which he did by depositing them in the bank, where they remained until C.'s death. C. had more money in the bank than was called for by the respective checks. It was considered that there was no valid gift, the delivery of the checks and pass-books

¹ *Conser v. Snowden*, 54 Md. 175; S. C. 39 Am. Rep. 368; *Dougherty v. Moore*, 71 Md. 248.

² *Smith v. Speer*, 34 N. J. Eq. 336.

not transferring the funds deposited, for the reason that C. had not absolutely parted with his control over them, nor was there a valid declaration of a trust.¹

332. GIFT OF DEPOSIT-BOOK IS NOT A GIFT OF THE FUND—ENGLISH RULE.—The English, Irish, and Canadian rule with respect to the gift of the deposit-book of a savings bank differs from the usually accepted rule followed in this country. Thus a decedent as a gift *mortis causa* gave the claimant her bank-book of a savings bank, intending thereby to make her a present of the deposit. A rule of the bank provided that the bank would be open five days in the year, “on which the book of each depositor shall be produced at the office of this savings bank for the purpose of being inspected, examined, and verified with the books of the institution by the auditor or auditors.” Another rule provided that payment would be made only to the depositor himself, or on his power of attorney during life; and after his death if the deposit exceeded £50, it could only be paid on production of letters of administration. The attempted gift, however, was held invalid, being deemed nothing more than the pass-book of an ordinary bank of deposit; being only a mere voucher for the debt, not embodying the contract between the depositor and the bank.²

333. DONOR RESERVING INTEREST ON DEPOSIT.—Another phase of deposits in savings banks, is where the donor retains the right to draw and use the accruing interest thereof. Such a reservation is not inconsistent with the validity of a gift. Thus a father deposited

¹ Curry v. Powers, 70 N. Y. 212; S. C. 26 Am. Rep. 577.

² McGonnell v. Murray, 3 Ir. Eq. 460 (1869); McCabe v. Robertson, 18 C. P. U. C. 471 (deposit receipt); Lee v. Bank of British N. A., 30 C. P. U. C. 255 (deposit receipt); *Ex parte* Gerow, 10 N. B. 512 (deposit receipt); Moore v. Ulster Bank, 11 Ir. C. L. 512 (1877).

money in a savings bank in the name of his daughter, intending it as a present to her, subject, however, to the right in himself and wife to take the income during their lives. The daughter was informed of the arrangement and assented to it, but the deposit-book was never delivered to her. This was held to be a good gift of the deposit, subject to the life interest specified.¹ A deposited all the money allowed in such a bank in his own name and on his own account, making three other deposits as trustee, one of which was in trust for his only son by name, and the others in trust for his two grandchildren by name. For these deposits he took separate bank-books containing entries of the same, which he retained until his death. During his lifetime he collected, receipted for, and used, as his own, all the dividends declared upon these deposits. A by-law provided that "no person shall receive any part of the principal or interest, without producing the original books, in order that such payments may be entered therein;" and also that "any depositor, at the time of making his deposit, may designate the person for whose benefit the same is made, which shall be binding on his legal representative." In a contest over these three deposits, it was held competent to show, in addition to the above facts, that A had said "that he put this money in the bank for them [the son and two grandchildren]; that he wanted to draw the interest during his lifetime; and that after he was gone they were to have the money;" and that upon all the facts, as stated, and this evidence, a jury would be justified in finding that A had fully constituted himself a trustee for the donees.² But where the donor assigned the certificate of

¹ *Smith v. Ossipee Valley Savings Bank*, 64 N. H. 228; S. C. 10 Am. St. Rep. 400; *Boone v. Citizens' Savings Bank*, 21 Hun, 235.

² *Gerrish v. New Bedford, etc., Bank*, 128 Mass. 159; S. C. 35 Am. Rep. 365.

deposit of a savings institution in trust for his son, reserving the right to use the money during his life, and directed the residue to be paid at his death to his son, the gift was held invalid for want of actual delivery, though the assignee surrendered the certificate and took out a new one during the life of the assignor.¹ A, being sick, gave his daughter certificates of deposit. Twice afterward, when the interest matured, she took the certificates to the bank and got them renewed, and gave them back to him and he handed them back to her, telling her to take them home, which she did. The interest was added to the certificates at each renewal. This was held to be a valid gift.²

334. REDELIVERY OF DEPOSIT-BOOK TO DONOR.—A deposited a sum of money in a savings bank in the name of B, "subject to the order of A." A few days thereafter A asked B to come to his house, showed him the deposit-book, said he was going to give it to him, and delivered it temporarily into his possession. He then said he would keep the book for B, as he had a safe, and took and put the book into it. On the same day, A, at B's request, signed and delivered to him a paper certifying that the money was for him. A never drew the interest upon the deposit, but allowed it to accumulate during his life, in no way asserting a personal ownership of the fund. After A's death, although B notified the bank that the money was his, the bank paid the amount of the deposit to the administrator of A; whereupon B sued the bank for the amount thereof. It was decided that the jury was authorized to find a completed gift of the money by A to B, and that the bank was liable to B for it.³ So where A de-

¹ Withers v. Weaver, 10 Pa. St. 391.

² McCabe's Estate, 6 Pa. C. C. 42.

³ Eastman v. Woronoco Savings Bank, 136 Mass. 208.

posited funds in such a bank in his own name as trustee for B, gave the bank-book to him, received it back and it so remained until his death, it was held to be a completed gift, enforceable in equity, A holding the book as a trustee.¹

335. DEPOSIT IN TWO NAMES—GIFT TO THE SURVIVOR.—It is no uncommon thing to meet with cases where money has been deposited in bank by a depositor to the credit of himself and another ; and the question arises, if the transaction amounts to a gift. Each case will have to be examined by itself, and stands upon its own peculiar facts. In New York a husband deposited his money in a savings bank in his own name and that of his wife, as follows : “Richard or Kate Ward,” and had the entry thereof so made in his pass-book. He drew from the account on several occasions, but she never did until after she came into the possession of the pass-book after his death. It was decided that this did not constitute a gift by the husband to the wife, especially in view of the fact of his retaining the fund in his own name, and thereby evidencing an intention not to lose control over it.² A husband put his money in a savings bank, saying that he wanted it so that either he or his wife could draw it out ; and both he and his wife entered their names on the signature-book, opposite which the clerk of the bank wrote the words “to be drawn by either.” A pass-book was given to the husband, as a voucher for the deposit. It was held that there was no valid gift ; nor was she entitled to it as survivor.³ An account was opened in a savings

¹ *Ray v. Simmons*, 11 R. I. 266 ; S. C. 23 Am. Rep. 447 ; 15 Amer. L. Reg. 701.

² *Matter of Ward*, 51 How. Pr. 316. The court declined to follow *Sandford v. Sandford*, 45 N. Y. 723, where it was held that taking a note in his own and wife's name constituted such note a valid gift without a delivery of it to her.

³ *Brown v. Brown*, 23 Barb. 565 ; *Drew v. Hagerty*, 81 Me. 231 ; S. C. 10 Am. St. Rep. 255.

bank to the credit of "James Cannon, subject to his order, or to the order of Mary E. Cannon," his daughter. From time to time money was there deposited. When James died Mary claimed that he, in his lifetime, gave her the deposit-book with the money to be credited therein, to be held by her in trust for herself and her brother and sisters. The only way in which money could be changed from one person's account to another's in the bank was "by a payment of the one account and a new deposit in another account." James had given the book to Mary. But notwithstanding these facts, the validity of the gift was denied. "The money in question was deposited in the savings bank," said the court, "to the credit of James Cannon, and so continued up to the time of his death. He retained dominion and control over it by the very terms of the account with the bank, and could at any time have drawn it out, or revoked the power given to Mary E. Cannon to obtain it upon her own order. If she had drawn out any portion of the money, she would have drawn it out as the money of James Cannon, acting in the matter as his agent, and by virtue of a then existing authority derived from him. This agency was revoked by his death, and the bank properly refused to recognize it after that period." Touching the effect of the delivery of the deposit-book, it was said that the delivery could not complete the gift, for the only way to transfer money in the bank from one to another was "by a payment of the one account, and a new deposit in another account;" and of this rule James Cannon was well aware.¹ But in a New York case the donor first deposited the money in his own name. Afterward he came with the donee to the bank and had his account changed so as to read "Mechanics' and Farmers'

¹ *Murray v. Cannon*, 41 Md. 466.

Savings Bank, in account with Valentine Baker [the donor], and Mrs. Mary Mack [the donee], order of either of them," the donee at that time signing the signature-book of the bank. Still later the donor said, speaking to the donee of this account and showing her the book, "This is yours;" and the day before his death he sent the book to her with the message, "Tell my mother [the donee] to keep it for me." While it was deemed that the delivery of the book to her, accompanied by the message, was not enough to establish the gift had the money stood in his name, yet, as she then had the right to draw the money, the possession of the book gave her complete power on that day to draw out the money for herself, and that she was entitled to it as a gift.¹ So, where the deposit was in the name of "A and B," B being the wife of A; and a certificate of deposit was thus issued; it was held to be a *prima facie* gift to her in case she survived him; and he not having disturbed it in his lifetime, although the money was his solely before the deposit, it becomes absolutely hers at his death.² A depositor being in feeble health and contemplating a departure from home for the benefit of his health, made a deposit in a savings bank to himself and mother, and it was so credited in his pass-book and the books of the bank. Sometime afterward he went to the bank with his sister

¹ Mack v. Mechanics' and Farmers' Savings Bank, 50 Hun, 477. In New Hampshire it was decided that an agreement between two depositors, that the survivor should have the other's deposit, each retaining the absolute title and control of his deposit during life, was a testamentary disposition of property not made according to the statute of wills, and was invalid: Towle v. Wood, 60 N. H. 434. Donor had an account in bank as follows: "H for her daughter Kate," and then changed it to "H or sister J," so J could draw on it. H died and in a week J also died, and the bank-book was found with the effects of S, another sister of J, with whom she lived, and who died one week after J. It was held that there was a valid delivery to J: Hannon v. Sheehan, 19 N. Y. Supp. 698.

² Roman Catholic Orphan Asylum v. Strain, 2 Bradf. 34.

and had the name of his mother erased and his sister's substituted, the account then running "J. H., M. J. and the survivor of them subject to the order of either." After this change in the entry the depositor drew out a small part of the fund, and died nearly three months later. M. J. obtained possession, after his death, of the deposit-books and drew the money; but it was held that she was not entitled to it, for the donor had only constituted her his agent to draw the fund during his lifetime, and his death was a revocation of the authority, a gift not being created by the written entry. Nor could it be said that a trust had been created.¹

336. GIFT OF A SPECIAL DEPOSIT.—A valid gift may be made of a special deposit by a mere transfer of the certificate of deposit. In a case of special deposit the particular thing deposited, whether it be a bond, coin, or bills, is to be returned—the identical thing deposited—and not another, even though exactly like it. Where a certificate

¹ Taylor v. Henry, 48 Md. 550; S. C. 30 Amer. Rep. 586.

See Hayden v. Hayden, 142 Mass. 448. A deposit made in name of depositor "or daughter B" was held not a valid gift, even though the donee was in possession of the book after the donor's death, they two living together, the donor being an invalid and the daughter transacting all her business: Bolin's Est., 32 N. E. Rep. 626; S. C. 20 N. Y. Supp. 16; Cody's Est., 20 N. Y. Supp. 16. A donor had several thousand dollars standing to her credit in a savings bank, and she requested the teller of the bank to transfer \$1,500 to each of her three nieces, one of whom was with her. The teller did so, charging the donor's account with \$4,500, and opening an account with each of the nieces for \$1,500, and prepared a bank-book for each. The donor requested that the bank-books be so made that the money could not be drawn out during her life, and the teller indorsed on each of them "Only C has power to draw." The donor (C) and the niece who was present wrote their names in a signature-book kept by the bank, the teller adding to the donor's name the word "Trustee." The names of the other two nieces were afterward written on slips by them and sent to the bank, the teller writing the donor's name with the word trustee added. The donor before the transfer had declared her intention to make the gift. She took the three new books and kept them during her life. It was held there was a valid gift *inter vivos*, and that donor had constituted herself a trustee for the donees: Buckingham's Appeal, 60 Conn. 143.

of deposit is given, especially if payable to order, the bank has a right to insist upon the return of the certificate when a return of the deposit is desired or demanded. It has therefore been held that a transfer of the certificate of deposit is a transfer of the thing deposited. This transfer of the certificate is usually effected by indorsement.¹ But where the special deposit was a box of gold, no certificate having been given, and the person with whom it was deposited was instructed by the depositor to deliver the box to no one except himself or wife, and in case of his death, to his wife; and during his lifetime the husband told her the deposit was made for her, and gave her the key, saying she need not send for any of it, but she must go herself and get it, which she did after his death, the gift was held to be incomplete, it appearing that the husband had, after the delivery of the key, probably taken out more than half the gold, at least there being less than one-half the amount in the box at his death he said there was in it at the time he delivered the key.²

337. OVERTHROWING PRESUMPTION OF GIFT ARISING FROM FACT OF DEPOSIT IN ALLEGED DONEE'S NAME.—In a New York case is a dictum or intimation that the fact of making a deposit of money in the name of another, or in the depositor's name for the benefit of another, does not conclusively establish or show a trust, "so as to preclude evidence of contemporaneous facts and circumstances constituting *res gestæ*, to show that the real motive of the depositor was not to create a trust, but to accomplish some independent and different purpose inconsistent with an intention to divest himself of the beneficial ownership of the fund."³ The intimation here thrown out was after-

¹ Phillips v. Franciscus, 52 Mo. 370; Young v. Young, 80 N. Y. 422; S. C. 36 Am. Rep. 634; Welsch v. Belleville Savings Bank, 94 Ill. 191.

² Sheegog v. Perkins, 4 Baxt. 273.

³ Mabie v. Bailey, 95 N. Y. 206.

ward followed. A father put money in a bank, in his name, "in trust for" his son, in order to obtain the highest rate of interest which the bank allowed, not intending to part with the ownership or right of receiving back the money from the bank, nor to make a gift or transfer of it, or in any way part with it to the son; and upon an agreement with the bank that no part of the money should be drawn from the bank without the production of the bank-book, which he retained in his own possession. Afterward he drew a part of the sum deposited. It was held that the circumstances under which the deposit was made were admissible to vary or explain its character as a trust; that the father had no intention of creating a trust, and that none was created.¹

TRUST RAISED BY A DEPOSIT OF MONEY.

338. TRUST RAISED BY DONOR DEPOSITING MONEY IN BANK—NOTICE OF TRUST—REVOCATION.—By depositing money in a savings bank, or in fact in any other bank, a depositor may raise a trust in favor of a third person, even though the latter remain in ignorance of it until after the death of the donor. Thus B deposited in a savings bank \$500, declaring at the time that she wanted the account to be in trust for C. The account was so entered, and a pass-book delivered to B, which contained these entries: "The Citizens' Savings Bank in account with B, in trust for C. 1866, March 23. \$500." A like deposit, at the same time, was made by B for D. B retained possession of the pass-books until her death, eleven years after the deposits were made. C and D were ignorant of the deposits until after B's death. The money remained in the bank, with its accumulated interest, until B's death, ex-

¹ Weber v. Weber, 9 Daly, 211.

cept one year's interest which she drew out. An action was brought against the estate of B, and a recovery allowed; upon the theory that B had constituted herself a trustee for C and D, the retention of the pass-book being nothing more than vouchers for the property, which she retained as trustee, such retention not being inconsistent with the completeness of the gift, notice to the *cestuis que trust* being held not necessary. "Upon these facts [narrated above]," said the court, "what other intent can be imputed to the intestate than such as her acts and declarations imported, and did they not import a trust? There was no contingency or uncertainty in the circumstances, and I am unable to see wherein it was incomplete. The money was deposited unqualifiedly and absolutely in trust, and the intestate was the trustee. It would scarcely have been stronger if she had written in the pass-book, 'I hereby declare that I have deposited this money for the benefit of the plaintiff and I hold the same as trustee for her.' . . . The retention of the pass-book was not necessarily inconsistent with this construction. She must be deemed to have retained it as trustee. The book was not the property, but only the voucher for the property, which after the deposit consisted of the debt against the bank." Referring to the lack of notice to the donees that they were to be benefited by the trust raised, the court said that there were facts from which the inference might be drawn that the donor regarded the gifts as fixed and completed. "The circumstance that she did not intend that the objects of her bounty should know of her gift until after her death is not inconsistent with it, and the most that can be said is that she may have believed that the deposit might be withdrawn during her life, and the money converted to her own use. It is not clear that she entertained such a belief, but if she did it would

not change the legal effect of her acts." - Other cases almost identical in facts have been decided the same way.² So where money was deposited with the defendant and a note taken payable to the depositor for another person, it was held that the depositor had constituted himself a trustee.³ A mother deposited funds in a savings bank in the name of her son, who was thriftless, and subsequently drew out the funds and deposited them in her own name. After making this change in the funds she gave them to a friend (who had been a friend to her son), and asked her to be a mother to him, and finally made the friend her executrix. The son was entirely ignorant of the transaction ; but it was held that the trust created by the first deposit was an irrevocable gift which could be enforced against the executrix. " Her control of the money," said the court, " and her withdrawal of it from the bank, are consistent with the theory of a trust, and her subsequent possession must, upon authority, be held to be in the capacity of trustee, rather than of the owner of the property." ⁴ Even dealing with the fund as his own by the depositor does not change the nature of the transaction, such as drawing out the money and replacing it, or a part or even more, or any other act.⁵

339. SAME SUBJECT—RETAINING CONTROL OF THE FUND.—The cases upon the subject under discussion are

¹ *Martin v. Funk*, 75 N. Y. 134 ; S. C. 31 Amer. Rep. 446. (Distinguishing *Brabrook v. Savings Bank*, 104 Mass. 228 ; S. C. 6 Amer. Rep. 222, and *Clark v. Clark*, 108 Mass. 522.)

² *Mabie v. Bailey*, 95 N. Y. 206 ; *Ray v. Simmons*, 11 R. I. 266 ; S. C. 23 Amer. Rep. 447 ; 15 Amer. L. Reg. 701.

³ *Smith v. Lee*, 2 T. & C. (N. Y.) 591.

⁴ *Matter of George*, 23 Abb. N. C. 43.

⁵ *Willis v. Smyth*, 91 N. Y. 297 ; *Barker v. Harbeck*, 17 N. Y. St. Rep. 678 ; *Scott v. Harbeck*, 49 Hun, 292 ; *Kerrigan v. Rautigan*, 43 Conn. 17. (In this last case the whole fund was drawn out by the donor and not replaced by him ; and yet the gift was held valid.) See *Minor v. Rogers*, 40 Conn. 512.

very close, and perhaps not distinguishable, and it is hard to say that they are harmonious. Take a New Hampshire case as an illustration. Thus in that State three books of deposit of a savings bank were found among a decedent's effects, one each in the names of Mary, John, and Florence. Mary stated that the deceased, her father, deposited the money in the bank in her name, and that he gave her the book containing the deposit standing in her name, and that she accepted it as a gift. As to her this was decided to be a valid gift. But there was no evidence tending to show that John or Florence ever had in their possession the books in their names, or even knew of their existence, until after their father's death. A by-law of the bank provided that "Depositors are alone responsible for the safe keeping of their books and the proper withdrawal of their money;" and that "No withdrawals will be allowed without the book, and the book is the order for the withdrawal." He caused an entry to be made on the bank ledger, showing that the money was payable to his own order. The court decided as to John and Florence there was no gift. "Retaining the title, and having the right to dispose of the money as he saw fit," said the court, "he did not make a gift of these two books. Nor did he on this evidence create a binding trust in favor of his children. If a trust at all, it was executory, and without consideration. No beneficial interest vested in the *cestuis que trust*. They had no knowledge of the arrangement, and were not parties to it. It was a voluntary disposition of his own property. If notice to the *cestuis que trust*, or donees, was not an essential element of the supposed trust or gift, and if the retention of the pass-books by the donor is not inconsistent with the completeness of the act, still there must be some evidence of the donor's intention to create a trust or to

make a gift, before either can be said to exist. But the fact that he attempted to make a gift, and failed, raises no presumption that he intended to establish a trust. The latter cannot be inferred from a radical imperfection in the former. The question is, whether the depositor's intention to establish a trust in favor of his children is proved by competent evidence. As there is no express declaration of a trust, as the by-law of the bank, which became a part of his contract of deposit, is one not inconsistent with the idea that he was placing his money there for himself, and as he retained the bank-book without notice to the defendants or to any one for them, and caused an entry to be made on the bank ledger showing that the money was payable to his own order, his intention to create a trust cannot be found."¹ Now take another New Hampshire case, not overruled by the one cited above, and we gain a clearer view of the question under discussion. There P deposited in a savings bank of that State money in the name of L, of Maine, but for her own use, assented in writing to the by-laws of the bank, and took and retained a duplicate book of the deposits until her (P's) death. A by-law of the bank provided that deposits should only be withdrawn by the depositors or person authorized by them. During her last sickness P, for the first time, told L of the gift; but she had previously, however, told two persons that she had made a deposit in the bank which she intended for L, and she showed to one of them the pass or deposit-book. The court decided that a valid trust had been created; and it was considered that the by-law was a potent factor in establishing the trust. "Although one condition of the by-law is," said the court, "that the

¹ *Marcy v. Amazeen*, 61 N. H. 131; S. C. 60 Am. Rep. 320; *Bartlett v. Remington*, 59 N. H. 364. In this last case the money was deposited "in trust for Sarah," and it was decided that parol evidence was admissible to show who was the beneficiary.

deposit shall only be withdrawn upon presenting the original deposit-book, still, another is, that it shall only be withdrawn by the depositor, or some person authorized by the depositor. Considering, then, that the donor adopted the whole by-law as part of her act in making the deposit, there would seem to have been a clear and absolute renunciation of title by her in the fund, and unequivocal transfer of the possession upon the terms and conditions set forth in the by-law. She, in fact, chose this mode of making a complete and definite appropriation of the money. A stronger declaration of trust could hardly be formed than that created by the manner of making the deposits—that is, in the name of her niece, without qualification or condition, supplemented by the by-law of the bank, which she adopted.”¹ B deposited in a savings bank \$800 in the name of C, but payable to himself. He took out a deposit-book and kept and controlled it. He drew out a little over one-half of this \$800, and a few months before his death directed the treasurer of the bank to add to the first entry “Payable to S. Barlow,” so as to make it read, “Payable to S. Barlow during his life, and, after his death, to Marion Cushing,” the original C. B, before he had made the deposit, executed his will, confirming all gifts that he had made or should thereafter make to any of his children. C was only a grandchild. There was no evidence that B did or said anything else in relation to the deposit, or did or said anything that indicated an intention to hold the deposit-book in trust for C. A by-law inserted in the book provided that no deposit could be withdrawn without the book was produced. The bank understood that B was the depositor, so treated him, and had no communication with C; nor had the latter any

¹ *Blasdel v. Locke*, 52 N. H. 238.

knowledge of the transaction during B's lifetime. In an action by the executor of B against the bank, to which C was made a party, it was held that there was no delivery nor acceptance of the deposit as a gift; nor was B a trustee of C, B not having declared himself a trustee nor done anything equivalent thereto.¹ A left at his death two savings bank-books, one of which stood in his own name and the other in the name of "B or order of A." B was a son of A. On the last page of the first book was the following: "May 12th, 1878. Treasurer of B Savings Bank: Pay B what may be due on my deposit-book, No. —, A." On the last page of the second book was also the following: "August 12th, 1871. Treasurer of B Savings Bank: At my decease pay B what may be due on my deposit-book, No. —, A." After making further deposits on both books, A drew out a part of the funds deposited after the dates of the orders, the books being kept by the treasurer of the savings bank and A having access to them whenever he pleased as long as he lived. He died in 1879. B never had possession of the books nor any knowledge of them during the life of his father. It was held that there was no gift of the money represented by the bank-books. There was no declaration of A that he intended a gift, and this, coupled with the fact that he had never delivered the books, was sufficient to defeat the alleged gift.² But where a merchant in China directed his London correspondent to transfer £1,000 from his tea account, and employ it in exchange transactions for the benefit of his children; and in subsequent letters wrote to the same correspondent "that he had declined giving any opinion as to the reinvestment of the fund, as he considered he had no further control over it,

¹ *Pope v. Burlington Savings Bank*, 56 Vt. 284; 8 S. C. 48 Am. Rep. 781.

² *Burton v. Bridgeport Savings Bank*, 52 Conn. 398; 5 S. C. 52 Am. Rep. 602.

as it belonged to his children," "that he had appropriated it to them, and his correspondents were to consider it as theirs;" and the correspondents accordingly opened an account, headed with the merchant's name, "Exchange account on account of children," previously informing him of their intention to do so—it was held that the first letter created a valid trust in their favor, although the fund was still so far in the donor's control as to be liable to his drawing, and although the donor in one of his letters had desired his correspondents to consider it as "subject to the order of his executors" in the event of his death.¹

340. SAME CONTINUED—EVIDENCE—REVOCATION.—Illustrations are probably better than anything that we can say. The practitioner, however, will not fail to notice the manifest discrepancy between the cases; especially between those of New York and Massachusetts. Thus in the latter State A deposited a sum of money in a savings bank in B's name. The pass-book was issued in the latter's name, with the following condition annexed: "Interest to be paid on order of A. Principal to be drawn by B after decease of A." The latter retained the pass-book until his death; and never had any communication with B in regard to the matter, B not knowing of the transaction until after the former's death. It was provided by a by-law of the bank that money deposited in it should only be drawn out by the depositor or some person by him legally authorized, nor should any payment be made to any person except on the production of the pass-book. But any depositor might designate, at the time of making the deposit, the period during which he desired the same should remain, and the person for whose

¹ *Vandenberg v. Palmer*, 4 K. & J. 204.

benefit it was made; and he should be bound by such condition annexed to the deposit. After A's death B sought to recover the deposit; but he was not allowed to do so, on the ground that there was no gift perfected nor any trust raised. The court said: "A declaration of trust by the owner, or a deposit of the fund in his name as trustee, or a deposit in the name of another, will not of itself be sufficient to prove a gift or voluntary trust; there must be some further act or circumstance showing a perfected gift of the legal or equitable interest." "The only contract made was between the depositor and the bank. The form of the deposit and the condition annexed were parts of that contract, and in some respects modified it; but, as regards the claimant, they are nothing more than declarations of the depositor, competent only upon the question of his intention." "If, by the delivery of the book, or a sufficient declaration of trust, or other act between the depositor and the claimant, the latter should acquire a right, the form of deposit would estop the depositor, as against the bank, from denying that right. The delivery of the book, or the other act, is the voluntary and efficient act which perfects the gift; until that is done, even if the intention is manifested, there can be no gift which will give legal or equitable rights. But no inference can be drawn, from the form or circumstances of the deposit, that the depositor intended to give to the claimant any right or interest in the fund to take effect during his own life, and deprive him of the dominion and control of the property, and prevent him from revoking the gift."¹ In a subsequent case in this same State it was decided that to make a gift valid, in case of a deposit in a savings bank in the donee's name, without the donee's knowledge,

¹ *Sherman v. New Bedford, etc., Bank*, 138 Mass. 581; *Stone v. Bishop*, 4 Clif. 593; S. C. 6 Repr. 706.

the depositor retaining possession of the deposit-book, the money must be deposited by the donor with the intention of making a gift of it to the person in whose name it is put, and it must be accepted by him. To show the intention of the donor in retaining possession of the deposit-book, in an action by the donee against the bank, it was held competent to prove the taking of an order on the bank signed by the donee for the payment of a certain sum to the depositor, and, after the latter's death, his declarations and letters respecting it, preceding and accompanying it. In this case the donee received in a letter an order on the bank for the payment of a certain sum to the depositor, to be signed by the donee. The letter was not in the handwriting of the depositor, but was signed in his name by another person, whose agency was not shown. The donee signed this order and returned it to the depositor. The court excluded this letter, but this was decided to be error. So it was held admissible for the donee to show a letter from the treasurer of the bank to the depositor, who had deposited money therein in his own name, notifying him that a certain sum was standing to his credit in the bank on which he was not entitled to interest, because in excess of the amount upon which interest could be drawn. The donee was allowed to show the declarations of the donor relating to the deposit; but those opposing the gift were not allowed to show the declarations of the depositor, made some time after the money was deposited, with reference to her intention not to make a gift, which were made when she came to make her will. The theory upon which these were excluded was that the gift, if perfected, was a completed one when the deposits were made and the orders signed; and any act of the donor thereafter could not re-

voke it.¹ Evidence that money was deposited "in trust" for the claimant by the depositor who kept the deposit-book, and who shortly before his death said "I put in for you," in the savings bank, "that money is yours," will justify a finding that there was a perfected gift to that person.² A somewhat stronger case occurred in Maine. There a grandmother told the treasurer of a savings bank she desired to make a deposit for each of four grandchildren, naming B as one of them, to which she proposed to make additions from time to time, and expressed the hope that with the accumulated interest the deposits might amount to enough to be of advantage to them when they attained a suitable age to be entrusted with such sums of money. She said she desired "to do something for the children." She took out pass-books in the name of each child, in each of which, and in the bank-books, was entered "subject to the order of F [the grandmother] during her lifetime." She afterward told B what she had done and that the money was for him and the other three children. She made other deposits, but only drew one dividend. Before her death she took the books to the bank and told the treasurer "that the time had come when she desired to make such a change in the terms of the deposits made for her grandchildren . . . as would give them full control over them, and the amounts on each book become the absolute property of the parties named therein, and her right to control them should cease. Her expressed wish was that her claim over the amount of the deposits should be withdrawn as to each case and the books so changed that they would stand in the names of the grandchildren without any

¹ *Scott v. Berkshire, etc., Bank*, 140 Mass. 157; *Alger v. North End Savings Bank*, 146 Mass. 418.

² *Alger v. North End Savings Bank*, 146 Mass. 418.

restriction whatever." At her request the treasurer then and there erased from the pass-books and bank-books the original entry, "subject to the order of F." She notified B by letter of this change and that the pass-books would be delivered the first time they met. B answered, requesting that the books be sent to him. Shortly before her death she delivered them to C, with a written order to enable him to draw the amount of each deposit, which he did. B sued C for the amount of his deposit, and recovered it upon the ground that the deposit when first made created a valid trust and F controlled the same in trust for B; that her subsequent acts and declarations, at the time of the change of the entries in the books, showed a completed and executed gift, divesting her of any interest therein as trustee or otherwise, she thereafter holding the pass-books in trust for B; and that C took the pass-books without any consideration and with full knowledge of the gift.¹ But where the deposit was made "in trust" merely, without any declaration whatever of a trust, and the donor retained the pass-books until his death, it was held that there was no gift.² Yet where A handed over a sum of money to B for the use of C and took from B a certificate in writing, expressing that it was the sum given to C in A's will, and obliging B to annually pay the interest to C, the gift was held to be a completed one and irrevocable.³ In New Jersey a husband deposited money in a savings bank, the entry being as follows: "Bank for Savings, in account with A. G. and wife E., or either." At the time of the deposit he had as much deposited in his own

¹ *Barker v. Frye*, 75 Me. 29.

² *Robinson v. Ring*, 72 Me. 140; S. C. 39 Amer. Rep. 308; *Northrop v. Hale*, 73 Me. 66, 71. *Contra*, *Witzel v. Chapin*, 3 Bradf. 386; *Boone v. Citizens' Savings Bank*, 21 Hun, 235 (donor drew out one year's interest, still gift held valid).

³ *Parker v. Ricks*, 8 Jones L. (N. C.) 447.

name as the bank would receive. He himself drew the interest on the joint deposit. No delivery of the pass-books was shown, and the only evidence of a gift was a declaration to his wife, when she was scolding him about drawing the other money from the bank, that he would have no more to do with it. It was held that no gift was established by the proof.¹

341. SAME CONTINUED—SOME MASSACHUSETTS CASES.—We have considered it best to treat some of the Massachusetts cases in a separate section, chiefly for the reason that they are not in strict harmony with cases from other States, nor, probably, are they entirely consistent with themselves. The earliest case of a trust (not a gift) is where A was president of a society and was charged with depositing its funds in a savings institution. He took the money and deposited in the savings institute, the entry of deposit being, both in the deposit-book and in the books of the institute, "A in trust for the" society, it being named. Thereafter other sums were deposited by other individuals, which belonged to the society and in whose hands they had been placed for that purpose, and were entered in the same deposit-book and in the books of the bank in the same way as previously described. It appeared that the treasurer of the institution believed and supposed that the deposits were made with the understanding that they were wholly under A's control and subject only to his order; and the institution had invariably held itself answerable to the individual depositing the money; yet the court decided that the institution was chargeable as a trustee of the society of which A was president, and that the fund could be reached by the creditors of the society.² In a very much

¹ *Schick v. Grote*, 42 N. J. Eq. 352.

² *Raynes v. Lowell, etc., Society*, 4 Cush. 343. See *Wall v. Provident Institution for Savings*, 3 Allen, 96.

earlier case in that State, before her marriage, a wife held stock in an incorporated bank and received the profits thereof, even after she was married, until the charter expired; at which time the stockholders were entitled to subscribe a portion of the amount of their shares in a new bank. Her husband subscribed the authorized amount in the name of his wife, and refused to receive the remainder due her in money, saying it was not his (which it would have otherwise been by the common law), but his wife's. In a contest between her and his administrator, who had received such remainder and the dividends of the profits on the shares, it was decided that she was entitled to recover all the sums so received by them.¹ Where a husband deposited money in a savings bank, in the name and to the credit of his wife, he declaring that the money was hers and that he desired it put in her name, and delivered the deposit-book to her, it was held that the money inured to her sole benefit after his decease, as against his heirs and administrators. This was deemed especially true when he kept a separate account in his own name in the same bank and at the same time.² A deposited a sum of money in his own name in a savings bank, and at the same time deposited another sum in the name of "A, trustee for C," who was his daughter. He always retained in his possession the pass-books. After his death C sought to recover the money deposited by A as trustee; but it was held that parol evidence was admissible to show that both sums of money deposited were his and that one was made in her name because the amount of both exceeded the sum which the law allowed the bank to hold for a single depositor, notwithstanding a by-law of the bank, assented to by A, providing that any

¹ *Stanwood v. Stanwood*, 17 Mass. 57, citing *Nash v. Nash*, 2 Mad. 133. See, also, *Phelps v. Phelps*, 20 Pick. 556, and *Ames v. Chew*, 5 Met. 320.

² *Fisk v. Cushman*, 6 Cush. 20; S. C. 52 Am. Dec. 761.

depositor might designate at the time of deposit for whose benefit the same was made, and should be bound by such condition.¹ Where a widow had received money of her husband, and during his lifetime deposited it in a savings bank in her own name, she was not permitted to recover it after his death on proof that the money was his, was so deposited at his request and for his benefit, the presumption of a gift being rebutted.² So one depositing his own money in a bank in the name of another person to avoid attachment may maintain an action for it against the bank in his own name, if he did not intend to make a gift or transfer to that person of the money, and if he has tendered to the bank his pass-book, without even giving a bond of indemnity.³ So, also, where a husband deposited money in a savings bank in his wife's name, and had the bank-book therefor made out in her name and delivered to her, he was not allowed to recover of the bank the amount deposited, for the money was hers by virtue of the transaction. It was deemed that the bank had a contract with her to account to her for the money, and not to him.⁴ A deposited money in a savings bank in her name as "trustee for B," but retained possession of the deposit-book until her death, when it came into the possession of her administrator. At times she drew out portions of this money, as well as other money she had there on deposit in her own name. This was decided not to constitute a valid gift, and that the administrator must retain the amount of the deposit as part of A's estate.⁵

¹ *Brabrook v. Boston, etc., Bank*, 104 Mass. 228; S. C. 6 Am. Rep. 222, followed; *Clark v. Clark*, 108 Mass. 522. See *Brown v. Bishop*, 5 Hawaiian, 54. It would have been otherwise if it had been her money: *Farrelly v. Ladd*, 10 Allen, 127; *Hunnewell v. Lane*, 11 Met. 163.

² *McCluskey v. Provident Institution*, 103 Mass. 300.

³ *Broderick v. Waltham Savings Bank*, 109 Mass. 149.

⁴ *Sweeney v. Boston, etc., Bank*, 116 Mass. 384.

⁵ *Jewett v. Shattuck*, 124 Mass. 590.

CHAPTER XIII.

GIFT OF STOCK.

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| 342. Stock May be the Subject of a Gift. | 350. Reserving Power of Revocation. |
| 343. Failure to Transfer Stock on Books of Corporation—American Cases—Acceptance. | 351. Donee Controlling and Receiving Profits, but Not the Certificate of Stock—Opera Box. |
| 344. Transfer Upon Books of Corporation Essential to Validity of Gift—Trust—American Cases. | 352. Donor Reserving and Exercising Control Over Stock. |
| 345. Transfer Upon Books of Corporation Essential to Validity of Gift—English Cases. | 353. Recovery of Donor from Sickness. |
| 346. Subscribing for Stock in Another's Name. | 354. Purchase with Notice of Assignment. |
| 347. Gift by Survivorship of Stock in Two or More Names. | 355. Apportioning Dividends. |
| 348. Gift by Power of Attorney or Deed—Release. | 356. Stock Secretly Given to a Subscriber in Order to Influence Others to Subscribe. |
| 349. Transfer on Books but Failure to Deliver Certificate. | 357. Directors May Not Give Away the Stock of their Corporation. |
| | 358. Corporators May Receive Its Stock as a Gift. |

342. STOCK MAY BE THE SUBJECT OF A GIFT.—Stock or shares of stock of a corporation or joint-stock company is the subject of a gift, just as much so as tangible personal property. The numerous cases cited hereafter amply sustain this assertion. The chief difficulty has been, however, to sustain transactions as gifts because of their lack of completeness. It must be borne in mind that a certificate of stock is not the stock itself, it is only the evidence of the ownership of it. Neither is the entry upon the books of the corporation the stock; it is only evidence of the ownership of the stock, usually of a higher degree than the certificate. Stock is, in fact, “incorporeal, personal property,” and yet still the subject of a gift.¹

¹ *In re Morgan*, 104 N. Y. 74; sufficiency of mental capacity to make a gift of

343. FAILURE TO TRANSFER STOCK ON BOOKS OF CORPORATION—AMERICAN CASES—ACCEPTANCE.—A number of cases have arisen with reference to the sufficiency of a gift of stock which has not been transferred upon the books of the company, and with reference to the right of the donee to compel such a transfer. In other words whether a gift of stock not transferred upon the books is valid. Speaking broadly, it may be said that such a transfer is essential in England to make the gift a perfected or valid one, but it is not essential in this country. The charters of the corporations or their by-laws are often made the turning points in decisions of this character. And first we will refer to the American cases which we now proceed to discuss. A lady was the owner of six shares of bank stock, standing on the books of the bank in her own name. Three weeks before her death, while in good health, she and the donee were together in a room, when she said to the donee: "Hand me the cloth pocket that you will find in that drawer," pointing to a drawer in a bureau in the room. On receiving it she opened it and from a pocket-book therein took two United States treasury notes for \$50 each, handed them to the donee, saying: "Give this to Jane Carman; the houses in Ohio street are all yours." Jane was the donor's niece. She then closed the pocket-book, put it back in the pocket, and said to the donee: "Here, I give you this; I make you a present of it; I have another, and want you to wear them, they are so very handy." The donee took the cloth pocket containing the pocket-book, and without opening the pocket, kept it in her possession until the donor died. The donee was ignorant of the contents of the pocket-

stock: *Van Deusen v. Rowley*, 8 N. Y. 358. That a husband may make a gift of stock to his wife, see *Deming v. Williams*, 26 Conn. 226; S. C. 63 Am. Dec. 386. Coupon government bonds: *Walsh v. Sexton*, 55 Barb. 251.

book until after the donor's death, when she opened it and found therein a certificate for the six shares of stock, unindorsed and untransferred. Upon these facts the court entered a decree compelling the bank to transfer the stock to the donee. The court considered that the occasion of making the gift was evidently one in which the donor felt disposed to make gifts, from the fact of the gift of the treasury notes; that she intended something more than a mere gift of the cloth pocket, because of the fact that she deliberately replaced the pocket-book therein before giving it to her; that it must be presumed she knew the stock was in the pocket-book, especially from the fact that it was the depository of other valuable articles; and that no reason appeared for her giving the pocket-book with the pocket without the contents of the former. The delivery of the certificate, with intent to make it a gift, was a sufficient delivery of the stock to make the gift a valid one.¹ Another case of this kind arose in Connecticut. A widower uncle of seventy, without children, promised his niece to compensate her amply, if she would live with him until his death. After five years he spoke to her of intending to make his will and give her a bequest, and after explaining it, asked her if she would be satisfied with it, and she said she would. Afterward he told her he had made his will, which he, in fact, had done, and which remained unrevoked at his death, six years later. A part of the bequest to her was ten shares of stock in a life insurance company, which was all the donor owned. At the time he spoke to her about the bequest, he told her he would do still more for her from time to time. A year later he handed her the certificate of these ten shares of stock, saying, "I give this to you," which

¹ Allerton v. Lang, 10 Bosw. 362; Cornell v. Cornell, 12 Hun, 312 (a gift *causa mortis*); Grymes v. Hone, 49 N. Y. 17; S. C. 10 Am. Rep. 313.

she took and retained. A few months later the company issued to him, as the owner of these ten shares, forty shares of new stock created out of its surplus, and he delivered the certificate to her, saying, "This insurance stock of yours is good stock ; they give forty shares for ten ; it is only a change of form, that is all ; I paid nothing for it." This certificate she also took and put with the other. Under these facts the court reached the conclusion that the certificates were delivered with intent to make the stock represented by them a gift, that they were so accepted, and the gift a valid one in equity, the equitable title so vesting in the donee that she was entitled to a decree compelling the executors of the donor to make a formal transfer of the stock. The court considered that the transaction was not to be regarded as a testamentary gift, and so need not be in writing, the donor's promise "to do more for her from time to time," showing that whatever more he intended to do was to be done in his lifetime. Nor was the transaction void under the statute of frauds, because not in writing ; the delivery of the certificates being a symbolical delivery of the stock, whereby the contract became executed, the court not allowing, in accordance with the rules and maxims of equity, the donee to be wronged by the interposition of the statute against the donee. The fact that the charter and by-laws of the insurance company provided that transfers of stock should only be made at its office, by the shareholder or his attorney, on surrender of the certificate, was deemed not to defeat the gift ; for that provision related only to the legal title to the stock, and the donor retaining the legal title became a trustee for the donee. Nor did the fact that the will gave the original ten shares, with other property, which was to be accepted by her in lieu of all claims on the testator, and the fact

that she had accepted the legacy, affect the case; for the stock was given her before his death, and therefore constituted no part of the assets of his estate, and her right to the forty shares constituted therefore no claim on the estate. She simply took what was already her own.¹ These cases rest upon the same ground upon which the validity of a gift of a chose of action, which has not been transferred in writing, is upheld.²

344. TRANSFER UPON BOOKS OF CORPORATION ESSENTIAL TO VALIDITY OF GIFT—TRUST—AMERICAN CASES.—There are a few American cases in which it is held that unless the stock is transferred upon the books of the company the gift is not valid. This is particularly true in Maryland. Thus where a father gave to his child, indorsing his name thereon, a certificate of bank stock, which contained a clause that the shares were “transferable at the said bank only, personally, or by attorney,” intending thereby to make him a present of the shares, the transaction was held not to amount to a gift. The indorsement was not deemed to be the equivalent of a power of attorney.³ Of this case it may be said that it was decided at an early day (1830) when the rule was quite firmly established that a chose in action was not the subject of a gift. This case was followed in one quite recently decided in the same State, and the rule clinched,

¹ Reed v. Copeland, 50 Conn. 472; S. C. 47 Am. Rep. 663.

² Walsh v. Sexton, 55 Barb. 251; Commonwealth v. Crompton, 137 Pa. St. 138. Where an alleged donor subscribed in the name of the alleged donee for stock in a proposed corporation, had the same entered in the books of the corporation in the donee's name, and paid the assessments thereon; it was held on a conveyance of the real estate, owned by the corporation, to the stockholders, that the donee took such a part of the land as his stock bore to the whole of the stock: McDonald v. Donaldson, 47 Fed. Rep. 765. That the evidence of a gift of stock must be clear, see Morse v. Meston, 152 Mass. 5.

³ Pennington v. Gittings, 2 Gill & J. 208 (1830). The case follows Tate v. Hilbert, 2 Ves. Jr. 111; and this is the only case cited in the opinion.

that an actual transfer of the stock on the books of the company was essential to the validity of the gift, unless the donor declared, after the indorsement and delivery of the certificate, that he held the shares in trust for the donee, in which event equity would perhaps seize upon and enforce the trust for the benefit of the donee.¹

345. TRANSFER UPON BOOKS OF CORPORATION ESSENTIAL TO VALIDITY OF GIFT—ENGLISH CASES.—The earliest case on the subject of a gift of stock in England was an attempt to give South Sea Annuities by a mere delivery of a receipt for them, issued by the company. The gift was held invalid. This was in 1752.² The court, however, regarded it as very strong evidence of a gift. Where the gift was by deed, but no transfer was made on the company's books, the court was inclined to think there was no gift, but declined to take any steps holding the donor's estate liable, until the donee had proceeded at law against the company and compelled it to make a transfer of the stock.³ If the gift is imperfect for want of transfer, the executor of the donor cannot make it valid by transferring or by procuring a transfer of the stock.⁴ The rule requiring a transfer upon the books of the company to make a gift perfect applies to a gift of railway stock,⁵ and to bank stock.⁶ The courts have even

¹ *Baltimore Retort, etc., Co. v. Mali*, 65 Md. 93; S. C. 57 Amer. Rep. 304.

² *Ward v. Turner*, 2 Ves. Sr. 431. See *Antrobus v. Smith*, 12 Ves. Jr. 39, where the receipt had never been delivered; and the decision rested on this fact.

³ *West v. West*, 9 Ir. L. Rep. 121 (1882). For a construction of "The Companies Clauses Consolidation Act," of 1845, concerning the transfer of stock given away, see *Copeland v. Northeastern R. W. Co.*, 6 El. & Bl. 277, and *Queen v. The General Cemetery*, 6 El. & Bl. 415.

⁴ *Dillon v. Coppin*, 4 Myl. & Craig, 647; S. C. 9 L. J. Ch. (N. S.) 87; 4 Jur. 427.

⁵ *Moore v. Moore*, 18 L. R. Eq. 474; S. C. 43 L. J. Ch. 617; 22 W. R. 729; 30 L. T. (N. S.) 752; *Pethybridge v. Burrow*, 53 L. T. Rep. (N. S.) 5; *Gason v. Rich*, 19 L. R. Ir. 391.

⁶ *Lambert v. Overton*, 13 W. R. 227; S. C. 11 L. T. (N. S.) 503; *Weale v.*

gone so far as to hold that railway stock cannot be made the subject of *donatio mortis causa*.¹ But voluntary assignment by deed of the assignor's interest in stock standing in the name of trustees, upon trust for him, is a complete transfer of such interest as between the donee and donor, although no notice of the deed was given to the trustees in the donor's lifetime; because no further act on the part of the donor was necessary to complete the gift.² The courts, however, drew a distinction, though very thin, between an assignment and declaration of a trust.³ Thus if the legal owner of stock merely assigns it, and makes no transfer, the gift is bad; but if he execute a declaration of trust, equity will compel its execution.⁴

346. SUBSCRIBING FOR STOCK IN ANOTHER'S NAME.—A very common form of a gift of stock is where the donor purchases stock and directs it to be issued in the name of the donee. In all such instances, if there is a complete delivery, the presumption of a gift arises. Thus, a husband subscribed in his own name for six shares of bank stock, and when, some time after subscribing, he paid the first installment thereon, he directed the cashier to make out a receipt to his wife, saying that the shares were hers, and that if he spent all his property she would have something to live upon if the bank should prosper. The receipt was made out in accordance with the directions, and the cashier requested him to take another share, but

Oliver, 17 Beav. 252; Beech v. Keep, 18 Beav. 285; S. C. 18 Jur. 971; 23 L. J. Ch. 539, consols assigned.

¹ Moore v. Moore, *supra*.

² Beech v. Keep, 18 Beav. 285; S. C. 18 Jur. 971; 23 L. J. Ch. 539.

³ Donaldson v. Donaldson, Kay, 711; S. C. 23 L. J. Ch. 788.

⁴ Bridge v. Bridge, 16 Beav. 315; S. C. 16 Jur. 1031; Beeden or Beecher v. Major, 11 Jur. (N. S.) 537; S. C. 13 W. R. 853; 12 L. T. (N. S.) 562; affirmed, 18 L. T. (N. S.) 554.

he declined, saying that he might, however, conclude to take some for himself; and if he did he should want more than one; but his wife did not want any more. Two and a half months afterward, he went with his wife to the bank and paid the last installment; and, by his direction, the cashier made out to the wife a certificate of six shares, in the usual form, delivered it to her, and took her receipt therefor. The payments of the installments were entered by the cashier on the stock journal as made by the wife. During his life the payments of the dividends were made to the husband, but he receipted therefor in his wife's name for the first one and in his own name for the subsequent ones. Ten months after the first purchase, he purchased in his own name ten shares of stock, which he pledged at various times to the bank as collateral security for money lent him; but he never so pledged his wife's six shares. He universally requested the cashier to give him the dividends on the two sets of shares in distinct and separate sums, and sometimes, when so receiving them, asked that the dividends on the six shares be paid in new bills or gold pieces, saying it would please his wife to have them. Under these facts the court decided that the gift was a perfected one and the donee entitled to the six shares.¹ The court relied upon an earlier case in the same State. In that case the wife, before her marriage, held certain shares of bank stock. After the marriage her husband received the dividends accruing on the stock until the bank charter expired. At the expiration of the charter the stockholders were entitled to subscribe a portion of the amount of their shares in a new bank. The husband subscribed the authorized amount in her name and refused to receive the remainder in money, saying that it was not his but hers. At his death his executor drew out

¹ *Adams v. Brackett*, 5 Met. 280.

this remainder and the dividends of profits on the new shares, and also a sum payable on account of the reduction of the capital of the bank ; but it was held that she was entitled to recover from the executor all the sums so received, with interest. It must be observed that the common law gave to him, by virtue of the marriage, all the personal estate owned by the wife at the marriage.¹ One S. purchased and paid for thirty shares of stock, at the time giving the treasurer directions to set it aside in the name of Y., and saying that he would let him know whether to deliver it to Y., and what to do with it at some future time. The receipt issued by the treasurer contained a statement that he had received the purchase-price from Y. The receipt came into Y.'s possession, but it did not appear how he received it. Y. had married S.'s niece, lived in his family, and had adopted a child in whom S. took a special interest. Some time afterward S. told Y. that he could only make the shares twenty-seven, and as the receipt was made out to him he would want an order for three shares, and Y. at once gave him an order on the company, directing a transfer of these three shares as S. might direct. No certificate of the stock was ever issued. S. told Y. to go to the office for the dividends, when they had been declared, that he had them made out in his (Y.'s) name, that they would help support the child, and that they would be paid to him by his (S.'s) direction until his (Y.'s) death. After the stock had been placed in Y.'s name, his wife died. He married again, but his wife did not care for the child. The court admitted that there had been a sufficient delivery of the stock, if S. had ever had any intention to make it a gift ; but that intention, as drawn from the above recited facts, was entirely absent. The court drew the conclusion from

¹ *Stanwood v. Stanwood*, 17 Mass. 57.

the facts that he did not intend to vest the title in Y. for himself, but did intend to create a trust for the child; that he did not intend that Y. should control the shares, but that the treasurer should retain them, subject to his (S.'s) control. Y. drew the dividends simply for the support of the child. "It may be true, in a legal sense," said the court, "that it was not necessary for Youmans to have the certificate of stock in order to constitute him a stockholder, but among business men the certificate of stock is regarded as representing the stock and the title thereto. Such is the common understanding, and Sharp undoubtedly supposed when he retained the certificate that the stock remained subject to his control. The fact that Youmans did not, during his life, nearly seven years, call for the certificate of stock shows quite clearly that he did not regard himself as the owner of the stock; and that Sharp claimed to have the control and disposition thereof appears from the fact that he assumed to dispose of three shares thereof, after the certificate for the thirty shares had been executed. It is true he applied to Youmans for an order to transfer these three shares, but that was merely a matter of form, because Youmans held the receipt and the shares appeared upon the books of the company in his name. That was a matter of book-keeping. Therefore I conclude that there was no delivery of the stock, within the meaning of the law, to Youmans, with intent to vest the title in him and give him the control thereof."¹

347. GIFT BY SURVIVORSHIP OF STOCK IN TWO OR MORE NAMES.—If stock is purchased in the joint names

¹ *Jackson v. Twenty third Street R. W. Co.*, 88 N. Y. 520; reversing 15 J. & S. 85. Two out of six judges dissented. Upon the facts given in the report of the decision in the lower court, the case was rightly decided; but it would seem from the report of the case as decided in the appellate court that all the facts were not given in the report of the decision below.

of the donor and donee, the latter will take it on the death of the donor, if thereby the donor intended to make gift of it. Thus a husband transferred certain four and five per cent. stocks, which was the whole of his funded property, into the joint names of himself and wife. Then by his will he bequeathed all his funded property to trustees, in trust for his wife for her life, and, after her decease, in trust to pay certain specified legacies of four per cent. stock, amounting, within £50, to the stock of that description which he had so transferred. The remainder of his estate he gave to other persons. Afterward he purchased further sums of five per cent. stock in the joint names of himself and wife. He died in her lifetime, having no stock except that mentioned above, without which his property was not sufficient to pay his legacies. It was held that she was entitled to the four and five per cents., and that the bequest of the testator's funded property was not sufficiently specific to make her elect between the stock and the benefits which she took under the will, in certain parts of the testator's property.¹ The relation, in such a case, of husband and wife raises the presumption of a gift;² and the same presumption, in fact, is raised where no relationship whatever exists.³ Where a widow in her eighty-sixth year caused a sum of £6,000 consols to be transferred into the joint names of herself and godson, in whose welfare she took great interest; and two years after remarried, the court declined to compel a re-transfer to her upon her application therefor of the consols, the original transfer not being for the purpose of creating a trust.⁴ But where an alleged donor directed

¹ *Dummer v. Pitcher*, 5 Sims. 35; affirmed, 2 Mylne & Keen, 262.

² *Ib.*; *Rider v. Kidder*, 10 Ves. 360; *Lorimer v. Lorimer*, 10 Ves. 367, *note*; *Deacon v. Colquhoun*, 2 Drew. 21.

³ *George v. Howard*, 7 Price, 661.

⁴ *Standing v. Bowring*, 27 L. R. Ch. Div. 341; S. C. 54 L. J. Ch. Div. 10; 51

his agents to invest part of his balance in their hands, in the purchase of stock in the names of himself and wife, in trust for his infant son; and they made the purchase as directed, except without having the trust declared or expressed, of which they informed him and their reason for not doing so—because the bank objected to trust-accounts appearing on their books—and he allowed the stock to remain without any trust being declared, and received the dividends of it down to his death; it was held that neither his son nor his wife (who survived him) was entitled to the stock, there being no valid gift.¹ But where a testator, having first made a will in favor of a person with whom he was cohabiting, afterward transferred stock into the joint names of himself and of that person, and subsequently to this transfer revoked his first will and made another in favor of a third person, a daughter of the original legatee, to whom by the first will nothing was given; it was held that there was no resulting trust for the testator in the stock, and the joint transferee was entitled to it by survivorship.²

348. GIFT BY POWER OF ATTORNEY OR DEED—RELEASE.—A gift of stock may be made by deed or a power of attorney, if the charter or by-laws of the corporation does not expressly prohibit it. But in all such instances a delivery of the deed or power of attorney is essential. Thus where a father executed a deed poll conveying to his daughter certain shares in the East India and Globe Insurance companies, to hold for her separate use, and in case her husband survived her, then with power for him

L. T. (N. S.) 591; 33 W. R. 79; *Garrick v. Tayler*, 7 Jur. (N. S.) 1174; S. C. 10 W. R. 49; 4 L. T. (N. S.) 404; 31 L. J. Ch. 68; affirming 7 Jur. (N. S.) 116; 30 L. J. Ch. 211; 9 W. R. 181; 3 L. T. (N. S.) 460; 29 Beav. 79; 48 G., F. & J. 159.

¹ *Smith v. Warde*, 15 Sim. 56.

² *Turnbridge v. Care*, 19 W. R. 1047; S. C. 25 L. T. (N. S.) 150.

to receive the dividends during his life, and after the death of the survivor of them, then for the benefit of their children equally, which deed was found at his death, two months after its execution, among the donor's papers, in an envelope marked "to be given to" the donee "at my death, and immediately;" it was decided that there was no valid gift of the shares of stock. The deed professed to grant, sell, and assign the stock to the donee. It was shown that a mere assignment would not enable the assignee to receive or recover either the stock or the dividends. It was also decided that the donor had not made himself a trustee. "So far," said the court, "from making himself a trustee of the stock, he states, upon the instrument, his intention of perfecting the gift by transfer of the stock, and endeavors to provide the means by which the grantee may obtain the legal title." This the court considered that he had not done.¹ But where the donor in her last sickness wrote from Ireland to her sister in New York, making a disposition of fifty shares of insurance stock to certain persons named, and also executed to her a power of attorney authorizing her to take all needful measures to effect a transfer of the stock to the donees; and the power having been executed, part before the donor's death and part after, by the surrender of the scrip to the company, and the issue of the shares to the donee mentioned in the letter, the gifts were upheld.² So where no certificates had ever been issued, a delivery of a power of attorney to a third person, with oral directions to have the stock placed in certain shares in the names of the donees, it was deemed a good gift, even though the power of attorney was returned to the room of the donor

¹ *Dillon v. Coppin*, 4 Mylne & Craig, 647; S. C. 9 L. J. (N. S.) Ch. 87; 4 Jur. 427.

² *Duigan v. McCormack*, 53 How. Pr. 411.

for safe-keeping.¹ And where a donor, then *in extremis*, executed the ordinary bank power of attorney, and delivered it to her sister B, whereby the latter was empowered to transfer into her own name government stock standing in the name of the donor; and the transfer was not made until after the donor's death, the gift was decided valid and effectual in B's favor.² So where the income from stock was released, by a letter addressed to the trustee in whose name the stock stood, the release was held valid after the donor's death.³ But even though the donee may receive a power of attorney empowering him to make a transfer of the stock, it is not conclusive that a gift was intended. Thus the owner of insurance stock appointed A his "attorney to receive and assign any scrip or dividends, or belonging to" him, in the insurance company, "and to receive the interest thereon." A, by virtue of this instrument, drew the subsequent dividend, deducting therefrom the amount of interest owed by the alleged donor to the company. Two months after the execution of the power, he died. Nearly a month later A, upon the transfer books of the company, assigned this stock from himself, as executor, to himself individually. Afterward, for years, he drew the dividends, and then assigned the stock to B. During his last illness, either before or after the execution of the power, he said to a witness, after looking over his papers and taking out his scrip, that he was going to give that to A, A not then being present. At another time he said to the same witness, after A, who was his son, had come home, that he had given A that scrip. A was his father's executor,

¹ *Caumont v. Bogert*, 36 Hun. 382.

² *Kiddill v. Farnell*, 3 Jur. (N. S.) 786; S. C. 25 L. J. Ch. 818. *Contra*, where not acted upon until after the death of the donor: *Peckham v. Taylor*, 31 Beav. 250.

³ *Hooper v. Goodwin*, 1 Swanst. 486.

and testified that after his father's death, he had possession of the stock; but was not permitted to testify that his father had transferred it to him, nor to state that at the time of the transfer, he gave it to him, because of his incompetency as a witness. This was all the evidence. The court decided that a gift of the stock was not shown, the burden of showing such being upon A or his assignee. The declarations of the alleged donor was deemed insufficient to show a gift, because they were only a conclusion from facts necessary to make a gift complete, and not the facts themselves; nor could a delivery be proved by the subsequent declarations of the donor. This, coupled with the fact that the witness thought she saw the scrip in the alleged donor's possession after the execution of the power, was held not to show a delivery as a gift. It was also held that the possession of the stock, held by A, as explained by the power of attorney, was the possession of an attorney for his principal, its terms importing a purpose to empower A to do acts relative thereto for the convenience of his father. In the generality of its power it did not intend to empower A to assign to himself or to receive for himself the proceeds of an assignment to another; and the presumption arising from this form of the power was that A's acts under it were the acts of the principal, his father, as still the owner of the stock. Paying interest out of the dividends on his father's mortgage was deemed to imply that his father still controlled the proceeds of the stock; and his assignment to himself as executor, was also deemed an admission that his father up to his death was the actual owner, although the company requested him to make it in that form.¹

349. TRANSFER ON BOOKS BUT FAILURE TO DELIVER THE CERTIFICATE.—If a transfer has been made by the

¹Smith v. Barnet, 8 Stew. (N. J.) Eq. 314; affirming 7 Ib. 219.

donor to the donee, on the books of the corporation, accompanied with the other requisites of a gift, but the certificate thereof, in his own name, be retained by the donor, the gift is still valid.¹ Causing such a transfer to be made and certificate issued in the name of but not delivered to the donee is a valid gift, even though the donee have no knowledge of such transfer until after the death of the donor. "Transferring the shares to her [the donee]," said the court, "upon the books of the company is putting her in complete possession of the thing assigned, and clothing her with the complete legal title. It stands in the place of a delivery. Such an act performs precisely the office which an actual delivery would perform if it were a chattel. It is as complete a delivery as the nature of the thing will admit of. There can be no clearer evidence of a design to part with the right of property in favor of another than an absolute transfer of the legal title to her for her own use. Retaining in his possession the certificates which are in her name, and which he could not use without her consent, cannot undo or qualify the decisive ownership with which he had invested her by the actual transfer to her on the books of the company. The best evidence of her ownership is the transfer on the books of the company. The certificates were but secondary evidence of her ownership, and only useful for purposes of transfer. They were nothing more than the official declaration by the company of what already appeared on their books. There was here no *locus pœnitentiæ*. He could not have used the certificates, nor could any one have used them except the donee."²

¹ Francis v. New York, etc., Elevated R. R. Co., 17 Abb. N. C. 1.

² Roberts' Appeal, 85 Pa. St. 84. See a transfer somewhat similar: Delamater's Estate, 1 Whart. 362.

350. RESERVING POWER OF REVOCATION.—A donor of stock may reserve a right to revoke the gift or to modify it. Thus the owner of stock in a railroad delivered the certificate, indorsed in blank, upon trust to pay the income to himself for life, and at his death to transfer such stock to certain charitable objects, reserving the right to modify the uses or revoke the trust. The trustee alone signed a memorandum to that effect. The reservation was held to be valid, and it was said that the gift would also have been valid if it had not been revoked.¹

351. DONEE CONTROLLING AND RECEIVING PROFITS, BUT NOT THE CERTIFICATE OF STOCK—OPERA BOX.—It is altogether possible for the donee to control the stock, receive all the benefits of ownership, believe that he is the owner, and yet not in fact be such owner. Thus a husband subscribed, paid for them, and took a certificate in his own name for four shares of stock in an opera house. The subscription entitled him to four seats in an opera box in the house. When the box was allotted a ticket was given to the owner, the possession of which entitled the holder to occupy the box and seats, under the regulations of the corporation. When he purchased the box (or shares of stock) he said that it was for his wife, and he so told her. She asked him what evidence she had to show that it was hers, and he delivered the ticket to her and said to her that it was not necessary that she should have any evidence of ownership; that it was hers in fact. She, with other members of the family, occupied it; and at one time she rented it, and received the rent herself, with the knowledge and approbation of her husband. The certificates of stock were never transferred to her, but were retained by her husband. Under the regula-

¹ *Stone v. Hackett*, 12 Gray, 227.

tions of the corporation, in order to transfer the shares of stock, it was necessary to surrender the certificates, and take new ones, in the name of the transferee. After his death she occupied it. Upon these facts, the court reached the conclusion that there was no valid gift, saying that the evidence showed that "the title to the box consisted of four certificates taken, and remaining in the name of Mr. Stevens [the husband], and that the tickets were the only evidence of the right to occupy, which were delivered to Mrs. Stevens. The expression of an intention to give the box to Mrs. Stevens did not consummate the gift, but it was necessary either to deliver the subject of the gift, or some evidence of title. It is quite evident that if Mrs. Stevens, on the faith of the four tickets and the allegation of ownership, had transferred the box in question to a third party, Mr. Stevens might have taken proceedings to eject the purchaser and to resume his authority over it. It seems to me equally clear that Mr. Stevens in stating that the box was his wife's, in view of his retention of the evidence of the title, did not show any intention to be divested of his title to, or control over it."¹

352. DONOR RESERVING AND EXERCISING CONTROL OVER STOCK.—A donor may so reserve or exercise control over the stock and dividends as to defeat the gift. Thus, a father transferred bank shares to himself as trustee for his two daughters, but retained control over them, appropriated the dividends to himself, and neither daughter ever knew that the transfers had been made until after his death. This was held not to make a gift, the court saying, "There was no act on his part delivering the

¹ *Stevens v. Stevens*, 2 Redf. 265. The wife was charged by the court with the rent and use of the box after her husband's death.

property out of his possession, indicating an intent and purpose to pass the title to his daughters; and he did not so deal with it as to deprive himself of the ownership or to change his right in this respect.”¹

353. RECOVERY OF DONOR FROM SICKNESS.—If a donor in extreme sickness makes a gift of stock, by making the proper transfer, and then recovers, the donee will be held as a trustee for the donor, for the recovery revokes the gift; especially is this true if the donee took it with the distinct understanding that the gift was conditioned on the donor not recovering from his present sickness.²

354. PURCHASE WITH NOTICE OF ASSIGNMENT.—A executed an assignment and power of attorney, indorsed upon a certificate of shares of stock, and made a gift of the stock to B by delivery of the certificate. A afterward, for a valuable consideration, executed an assignment of the same stock to C, and caused the same to be transferred to C upon the company's books. By the terms of the certificate, the stock was transferable only upon the books of the company upon surrender of the certificate. C knew of the assignment to B, being a witness thereto as well as an officer of the company. After the transfer to C, B presented his certificate and demanded a transfer of the stock to himself, and, on refusal of the company to do so, brought an action to compel a transfer, which he successfully maintained, the court holding that the first transfer was not a valid excuse for the refusal, for it was the company's duty to resist any transfer without the production and surrender of the certificate; and the fact that the first assignment was without consideration was immaterial, as the delivery of the certificate with the assignment, as be-

¹ *Cummings v. Bramhall*, 120 Mass. 552.

² *Staniland v. Willott*, 3 MacN. & G. 664.

tween A and B, passed the entire legal and equitable title to the stock.¹

355. APPORTIONING DIVIDENDS.—The dividends of certain bank stock were given for life to the donee, for his maintenance, “to be paid half-yearly, as they shall be received from the bank.” The donee died a few days before a semi-annual dividend was declared, and it was decreed that the dividends should be apportioned, and the amount which had accrued at the donee’s death should be paid to his executor.²

356. STOCK SECRETLY GIVEN TO A SUBSCRIBER IN ORDER TO INFLUENCE OTHERS TO SUBSCRIBE.—It is an ordinary device of the promoters of an enterprise to offer inducements to a person whose name will carry influence with and induce others to subscribe for shares of stock in the enterprise to make a secret donation to him of certain shares of stock, or sell it to him at a reduced price if he will subscribe for stock in the concern. Often it is understood that he will not be required to pay for any of the stock subscribed for, it being a pure gift. Such a transaction is a fraud upon the other subscribers, and such preferred subscriber cannot enforce the agreement if the company declines to do so. And where there are two or more such schemes proposed, but only one carried out, they may be so connected as to render the one actually executed void, although no new papers are executed in the last one.³

¹ *Cushman v. Thayer Manuf. Co.*, 76 N. Y. 365; S. C. 32 Am. Rep. 315; affirming 7 Daly, 330.

² *Ex parte Rutledge*, Harper Eq. (S. C.) 65.

³ *Nickerson v. English*, 142 Mass. 267; *White Mountains R. R. Co. v. Eastman*, 34 N. H. 124; *Melvin v. Lamar Ins. Co.*, 80 Ill. 446; S. C. 22 Am. Rep. 199; *Miller v. Hanover, etc., R. R. Co.*, 87 Pa. St. 95; S. C. 30 Am. Rep. 349; *Henry v. Vermillion, etc., R. R. Co.*, 17 Ohio, 187; *Robinson v. Pittsburgh, etc., R. R. Co.*, 32 Pa. St. 334; S. C. 72 Am. Dec. 792; *Harvey v. Hunt*, 119 Mass. 279; *Stanhope’s Case*, 1 L. R. Ch. 161.

357. DIRECTORS MAY NOT GIVE AWAY THE STOCK OF THEIR CORPORATION.—The directors of a corporation or company may not give away the stock of their corporation or company. The capital stock of a moneyed corporation, at least, is a fund for the payment of its debts. "It is a trust fund, of which the directors are trustees. It is a trust to be managed for the benefit of its shareholders during its life, and for the benefit of its creditors in the event of its dissolution." It is therefore held in this country that the directors cannot give away the stock, nor release a subscriber from his obligation to pay in full for the stock.¹

358. CORPORATION MAY RECEIVE ITS STOCK AS A GIFT.—It is competent to make a bequest of its stock to a corporation² and there is no reason why a gift *mortis causa* or *inter vivos* of such stock may not also be made.³ In case of a gift, the rules announced in this chapter with reference to a gift of stock between individuals apply. But probably the delivery of the certificate to the corporation, with intent to make a gift of the stock, would in all instances amount to a gift, unless the charter or by-laws required the holder in person to make the transfer on the books of the company in order to make a transfer valid, and even then, in some States, the delivery of the certificate would be a good transfer in equity. Usually when the holder of a certificate has done all within his power to secure a transfer from himself, a transfer is completed; and the lack of diligence, or failure to act, of the corporation, will not be permitted to defeat his intentions.

¹ Upton v. Tribilcock, 91 U. S. 45; Van Cott v. Van Brunt, 2 Abb. N. C. 283; S. C. 82 N. Y. 535; Foreman v. Bigelow, 4 Cliff. 508; Gaff v. Flesher, 33 Ohio St. 107; Union Mutual Life Ins. Co. v. Frean Stone Mf. Co., 97 Ill. 537; S. C. 37 Am. Rep. 129; Sawyer v. Hoag, 17 Wall. 610; Zirkel v. Joliet Opera House Co., 79 Ill. 334; O-good v. King, 42 Ia. 478. See Central Trust Co. v. New York City, etc., R. R. Co., 18 Abb. N. C. 381.

² Rivanna Navigation Co. v. Dawsons, 3 Gratt. 19; S. C. 46 Am. Dec. 183.

³ Lake Superior Iron Co. v. Drexel, 90 N. Y. 87, assumed as valid.

CHAPTER XIV.

GIFT OF REAL ESTATE.

359. Introduction.

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361. Husband to Wife—Wife to Husband.

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| 397. Land Given—Boundaries. | 402. When Donee takes Land Without the Insurance Thereon. |
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| 399. Donee Must Show that He Made Improvements or Expended Labor Thereon. | 404. Right of Donee's Creditors. |
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| 401. Acts and Conduct of Donor and Donee. | 406. Compensation in Damages. |
| | 407. Donee Entitled to Recover for Improvements. |

359. INTRODUCTION.—The subject of a gift of real estate may be divided into two branches: Gift by Deed; and Gift by Parol. Incidentally connected with the subject are those of Specific Performance and Trusts, which have, however, been fully treated elsewhere.

GIFT BY DEED.

360. PURCHASE BY DONOR AND CONVEYANCE TO DONEE BY VENDOR—SPECIFIC PERFORMANCE—PURCHASE—MONEY MORTGAGE.—A common form of a gift of real estate is where the donor purchases real estate and pays the purchase price, directing the vendor to make a conveyance directly to the donee. Where it is the intention of the donor to make a gift, such a transaction is valid.¹ Such a gift is completed when the deed, or contract for a deed, is delivered. It is irrevocable; and the donee may maintain an action against the vendor, in the case of a contract for a deed, for a specific performance of such a contract;² and, no doubt, where the deed has been delivered, an action of ejectment for possession; for as

¹ *Oliver v. Moore*, 23 Ohio St. 473; *Whitten v. Whitten*, 3 Cush. 191. A deed of "all the estate which he [the donor] owns at the date of the deed, or should own at his death," does not pass money of which he died possessed: *Butler v. Scofield*, 4 J. J. Mar. 139.

² *Raymond v. Pritchard*, 24 Ind. 318.

between the vendor and the donee the relation is one of contract. But where the husband purchased land subject to a mortgage-debt, causing the land to be conveyed to his wife as a gift, subject to the mortgage, and at the same time promised the vendor to pay the mortgage-debt upon maturity; it was held that his promise to pay the debt did not inure to her as a gift either of an interest in the land or of the money promised to be paid until payment in fact was made. The husband becoming insolvent before payment of the mortgage was made, payment thereafter was deemed fraudulent.¹

361. HUSBAND TO WIFE—WIFE TO HUSBAND.—A husband may make a gift of real estate by deed directly to his wife; and a nominal consideration and the use of the words grant, bargain, sell, convey, and warrant does not change the character or object of the conveyance.² Thus where a husband expressed his intention to execute the deed, of which expression the wife was aware, but she never knew it had been executed until after his death, when she found it among his papers, and that a record of it had been made in the recorder's office, it was held that there was a valid gift, her possession of the deed raising a presumption of assent to the gift.³ But a wife cannot make a gift of her real estate directly to her husband; for she cannot execute a deed unless he joins therein; and in

¹ *Oliver v. Moore*, 23 Ohio St. 473. If a husband has an equitable title in real estate and direct the person holding the legal title to convey it to his wife, such conveyance operates as a gift of the land: *Crittenden v. Canfield*, 87 Mich. 152.

² *Barker v. Koneman*, 13 Cal. 9; *Shepard v. Shepard*, 7 Johns. Ch. 57; S. C. 11 Am. Dec. 396; *Jones v. Obenchain*, 10 Gratt. 259; *Hunt v. Johnson*, 44 N. Y. 27; S. C. 4 Am. Rep. 631; *Blalock v. Milard*, 87 Geo. 573 (subsequent declarations of donor cannot defeat the gift); *Dale v. Lincoln*, 62 Ill. 22; *Capek v. Kropik*, 129 Ill. 509; *Sims v. Rickets*, 35 Ind. 181; S. C. 9 Am. Rep. 679; *Huber v. Huber*, 10 Ohio, 371; *Hartwell v. Jackson*, 7 Tex. 576; *Wilder v. Brooks*, 10 Minn. 50; *Beatie v. Calhoun*, 73 Geo. 269.

³ *Dale v. Lincoln*, 62 Ill. 22. See *Blalock v. Milard*, 87 Geo. 573.

the instance supposed, he cannot be both grantor and grantee.¹

362. COURTS WILL NOT ENFORCE A VOLUNTARY DEED—DELIVERY OF DEED.—If a deed is purely voluntary, the donee cannot invoke the aid of a court of equity to enforce its provisions. Delivery of the deed is an essential part of the gift, although a delivery for record is sufficient.² Thus where the deed was found among the donor's papers at his death, the court declined to enforce its provisions.³ This is especially true if the donor distinctly declared that the deed was not to take effect during his lifetime,⁴ or was not to be delivered until a lease for life was executed and delivered to the custodian of the deed.⁵

363. REFORMING A VOLUNTARY DEED—RESTORING LOST DEED.—A voluntary deed cannot be reformed. A court of equity never lends its assistance to enforce the specific performance of a voluntary contract, where no consideration emanates from the party asking performance, as in a gift.⁶ "What I consider," said Lord Romilly, "to be settled by the case is this, that if a voluntary deed is incomplete, this court will not compel the

¹ *White v. Wager*, 25 N. Y. 328; *Winans v. Peebles*, 32 N. Y. 423.

² *Oliver v. Moore*, 23 Ohio St. 473; *Groves v. Groves*, 3 Young & J. 163; *Colman v. Sarrel*, 1 Ves. Jr. 50; S. C. 3 Bro. C. C. 12; *Fletcher v. Fletcher*, 4 Hare, 67; *Price v. Price*, 14 Beav. 598; affirmed 1 De G., M. & G. 308; S. C. 21 L. J. Ch. (N. S.) 53; *Lamprey v. Lamprey*, 29 Minn. 151; *McEwen v. Troost*, 1 Sneed. 186; *Corley v. Corley*, 2 Coldw. 520.

³ *Martin v. Ramsey*, 5 Humph. 349; *Warriner v. Rogers*, 16 L. R. Eq. 340; S. C. 42 L. J. Ch. 581; 28 L. T. 863; 21 W. R. 766; *Richards v. Delbridge*, 43 L. J. Ch. 459; S. C. 22 W. R. 584; *Bottle v. Knockner*, 25 W. R. 209; S. C. 35 L. T. N. S. 545; 46 L. J. Ch. 159.

⁴ *Taylor v. Taylor*, 2 Humph. 597; *Dillon v. Coppin*, 4 Myl. & Cr. 647; *Jefferys v. Jefferys*, 1 Cr. & Ph. 138.

⁵ *Hoig v. Adrian College*, 83 Ill. 267.

⁶ *Mulock v. Mulock*, 31 N. J. Eq. 594; *Groves v. Groves*, 3 Y. & Jr. 163.

completion of an imperfect instrument; the court will never interfere to enforce a contract for the due execution of a voluntary deed."¹ If contrary to the intention of the parties, and perhaps if to the donor's intention alone, the whole will be set aside.² But a court of equity will establish or restore a lost voluntary deed where the gift has been consummated.³

364. GIFT IN WRITING ENFORCED BETWEEN BLOOD RELATIONS.—A father bought a farm and had it conveyed to himself. Shortly thereafter he put his daughters in possession of it, and they continued so in possession for twenty-eight years, when they brought an action against him to compel him to make them a conveyance of the land. Ten years before this action was brought, the father executed and delivered to them a paper, as follows: "I *sine* all my interest and claim unto Mary Marling and Elizabeth Marling, the farm they now live on, *caled* the *Harsty* farm, as witness my hand and *sel.* Elijah Marling." This was unsealed; yet it was held that a court of equity would effectuate the gift, by compelling a conveyance to the children.⁴ This case, and others, rest upon the relationship of the donor and donee, the proximity of blood being deemed a sufficient consideration. This principle does not, however, extend to collateral relations.⁵

365. DONEE MAY MAINTAIN AN ACTION FOR POSSESSION UNDER THE DEED.—If a deed of gift has been made

¹ *Lister v. Hodgson*, L. R. 4 Eq. Cas. 30; S. C. 15 W. R. 547.

² *Turner v. Collins*, L. R. 7 Ch. App. Cas. 329; S. C. 25 L. T. N. S. 374; *Phillipson v. Kerry*, 32 Beav. 628; *Broun v. Kennedy*, 33 Beav. 133; S. C. 9 Jur. N. S. 1163.

³ *Hodges v. Spicer*, 79 N. C. 223.

⁴ *Marling v. Marling*, 9 W. Va. 79; S. C. 27 Amer. Rep. 535; *McIntire v. Hughes*, 4 Bibb. 186 (father to son); *Mahan v. Mahan*, 7 B. Mon. 579 (father to son); *Bright v. Bright*, 8 B. Mon. 194 (father to son); *Jones v. Obenchain*, 10 Gratt. 259 (husband to wife).

⁵ *Buford v. McKee*, 1 Dana, 107.

and delivered—fully executed—the donee may maintain an action against the donor, and those holding under him, for possession of the land given. Thus a father executed a deed to his son for a small tract of land, delivering it to him. This was in 1837, and he resided thereon until his death, in 1859. While residing upon the land he repeatedly declared that the land belonged to his son, that he had given him a deed for it, declined to sell it when solicited, for that reason, and said he was to live thereon during his life. He paid the taxes, and even rented a part of it to the donee. At his death the son brought an action of ejectment against the heirs of his father, claiming ownership by virtue of the deed; and the court held that he could maintain the action.¹

366. RECITATION IN DEED OF A CONSIDERATION.—If the deed of gift contains a recital that it is made upon a good and valuable consideration, no presumption arises that the land was intended as a gift, even though from one relative to another standing in the relation of parent to child.² But it may be shown that there was in fact a sale and not a gift.³

367. A VOID DEED CANNOT BE CONSTRUED AS A GIFT.—A deed that is void cannot be construed as a gift. Thus where a statute required a gift of shares of stock to be made by deed, attested and sealed by the clerk of the court, making the affixing of the seal requisite to its validity, it was attempted to uphold the deed as a gift. It was decided that

¹ *Corley v. Corley*, 2 Coldw. 520.

² *Deloach v. Turner*, 7 Rich. L. 143.

³ *Meyers v. Farquharson*, 46 Cal. 190. This may not be done under the Ohio statute of descent where the phrase “deed of gift from ancestor” is used: *Patterson v. Lamson*, 45 Ohio St. 77. But this in no way affects the statement above, which is so potent at this day that a further citation of authorities is deemed unnecessary.

the action could not be maintained, and that the deed could not be introduced in evidence for that purpose.¹ Nor will a deed given for an illegal or immoral purpose be construed as a gift, nor enforced.²

368. PAROL TRUST.—A gift by a deed absolute on its face will defeat a parol trust or reservation in the donor's favor. It has the effect of an unconditioned gift, the trust being void.³

369. GIFT OF EASEMENT—TIMBER.—A gift of a right of way is not a gift of the earth and other materials which may exist within the boundary lines, the right of which is given. Therefore, timber growing in such right of way belongs to the donor.⁴

370. GIFT CAUSA MORTIS—MUTUAL MISTAKE—REVOCA-
TION OF DEED ON RECOVERY.—The law does not permit the gifts of lands *mortis causa*. Such a gift cannot be made. "A gift of real estate cannot be sustained as a *donatio mortis causa*, for that only extends to the person-
alty." Consequently, where A, being desperately sick, in prospect of death, executed to his wife a deed for all his real estate, and a separate deed for his personal property, both of which were recorded, it was held that the latter deed was good as a *donatio mortis causa*, but the deed for the real estate was invalid, both as a gift and as a testamentary disposition of the land.⁵ In this case the donor died from the sickness within a month after executing the deed. But where a donor, under like circumstances, exe-

¹ Blagg v. Hunter, 15 Ark. 246.

² Reade v. Adams, 5 Ir. C. L. Rep. 426.

³ Palmer v. Sterling, 41 Mich. 218.

⁴ Smith v. City of Rome, 19 Geo. 89; Lade v. Shepard, 2 Str. 1004; Goodtitle v. Acker, 1 Burr, 133.

⁵ Meach v. Meach, 24 Vt. 591.

cuted a deed of land, and then recovered, it was held that he could maintain an action to cancel the deed and set it aside, on the ground of mutual mistake of a material fact—the mistake of his early prospective death from that sickness.¹

PAROL GIFT.

371. A PAROL GIFT OF REAL ESTATE IS VOID.—A parol gift of lands, speaking generally, is void. There may be attendant circumstances which render it inequitable to allow a donor to assume the possession of land given to the donee by parol, which courts of equity will prevent; but, aside from these, the statute of frauds renders every parol gift of lands not only voidable, but void.²

372. GIFT FOLLOWED BY IMPROVEMENTS.—The statute of frauds renders almost every agreement not in writing concerning lands void, the chief exception being leases for three years; but all parol agreements for the conveyance of the fee simple of real estate is not only voidable but void, and neither party can avail himself of its terms. Courts of equity, however, were not slow to notice that the enforcement of the exact terms of the statute often worked great hardships. Thus, a sale of land by parol, followed by payment of the purchase-money, possession and erection of improvements thereon by the vendee, manifestly places the vendee in a very unjust position if he is compelled to yield up the possession to the vendor. So the same is true if the purchase-money has not been paid. So, too, it is manifestly inequitable to allow a donor to refuse to complete his gift when he has by his acts and words induced the donee to enter into possession of the real estate, and such donee has expended large sums of money in im-

¹ *Houghton v. Houghton*, 34 Hun, 212.

² *Duckett v. Duckett*, 71 Md. 357.

provements and the like. Therefore, courts have adopted the rule that, if the owner of land give it away, and the donee enter into possession, and make lasting and valuable improvements, the donor will not be allowed to shield himself under the statute of frauds and reclaim the land. This is the doctrine of the Federal courts¹ and of a number of State courts.² "There is no important distinction," says the New Hampshire court, "in this respect between a promise to give and a promise to sell. The expenditure of money or labor in the improvement of the land, induced by the donor's promise to give the land to the party making the expenditure, constitutes, in equity, a consideration for the promise, and the promise will be enforced."³ Thus, a father, in the last case cited, gave his son by parol a piece of land in 1860, and the son lived thereon for twenty years, erecting improvements valued at \$3,000. At his father's death the son filed a bill for specific performance, and it was held that he was entitled to it. So, where a father purchased the land for his son, with the distinct understanding that the latter should at once take possession, hold and use it as his own, the former repeatedly saying that he had so purchased it for him, given it to him, and placed him in possession thereof; conducting himself toward the son, as if the latter owned it, for seven years; the son paying the taxes, which were assessed to him; the father introducing the son to insurance agents as the owner of the land and the buildings thereon, which were insured in the name of the latter; the father saying he would convey the property to the son as soon as the preliminary arrangements for a deed had been perfected; and the son, under the faith of the promise, making im-

¹ *Neale v. Neale*, 9 Wall. 1.

² *Dawson v. McFaddin*, 22 Neb. 131; *Guyann v. McCauley*, 32 Ark. 97; *Truman v. Truman*, 79 Ia. 506; *Jones v. Tyler*, 6 Mich. 364.

³ *Seavey v. Drake*, 62 N. H. 393.

provements to the dwelling-house to the amount of \$3,000—the farm originally costing near \$12,000—the gift was held to be perfected, and specific performance was decreed.¹

¹ *Hardesty v. Richardson*, 44 Md. 617; S. C. 22 Am. Rep. 57. Cases in Maryland supporting this case are *Haines v. Haines*, 6 Md. 435; *Shepherd v. Bevin*, 9 Gill, 32; affirming 4 Md. Ch. 133.

Freeman v. Freeman, 43 N. Y. 34; S. C. 3 Am. Rep. 657 (a good defense in an action of ejectment), affirming 5 Barb. 306; *Kutz v. Hibner*, 55 Ill. 514; S. C. 8 Am. Rep. 665; *Syler v. Eckhart*, 1 Bin. 378. Such a gift is more in the nature of a contract. In fact, it has been said that the donee "is a purchaser for a valuable consideration;" and that "it is inaccurate language to call such a contract a gift, and confusion of terms is very apt to breed confusion of ideas:" *Moore v. Small*, 19 Pa. St. 461, 469; *Langston v. Bates*, 84 Ill. 524; S. C. 25 Am. Rep. 466; *Van Arsdale v. Perry*, 21 N. Y. Wk. Dig. 116; *Manly v. Howlett*, 55 Cal. 94 (in an action of ejectment, such a defense must usually be especially plead); *Moore v. Pierson*, 6 Ia. 279; S. C. 71 Am. Dec. 409; *Patterson v. Copeland*, 52 How. Pr. 460; *Dozier v. Matson*, 94 Mo. 323 (father afterward became insolvent); *Rumbolds v. Parr*, 51 Mo. 592 (father afterward became insolvent); *Murphy v. Stell*, 43 Tex. 123 (overruling *Boze v. Davis*, 14 Tex. 331; *Hendricks v. Snediker*, 30 Tex. 296; *Curlin v. Hendricks*, 35 Tex. 225); *Crosbie v. McDoual*, 13 Ves. 148 (often cited); *Burton v. Duffield*, 2 Del. Ch. 130; *Porter v. Allen*, 54 Geo. 623 (put upon the ground of a purchaser for value). Where a father put his son in possession under a promise to give the land; the son improved it, and then the father died; it was held that the son was entitled to have that land set off to him as his share of the estate, if it did not exceed that amount; and perhaps he was entitled to it any way: *Biehn v. Biehn*, 18 Gr. Ch. 497. Such transactions are more contracts than gifts, if coupled with a condition to support the donor: *Townend v. Toker*, 1 Ch. App. 446; 12 Jur. N. S. 477; 35 L. J. Ch. 608; 14 W. R. 806; 14 L. T. N. S. 531; *Lafollett v. Kyle*, 51 Ind. 446; *Campbell v. Mayes*, 38 Ia. 9; *Faxton v. Faxon*, 28 Mich. 159 (a promise not to enforce a mortgage against land if A would live thereon and support a family; held a valid gift of the mortgage); *Hill v. Chambers*, 30 Mich. 422 (for support); *Sower v. Weaver*, 84 Pa. St. 262 (long possession in donee is always a potent factor); *Lester v. Lester*, 23 Gratt. 737 (for support); *Stanton v. Miller*, 58 N. Y. 192, reversing 1 T. & C. 23; *McCray v. McCray*, 30 Barb. 633; *Hart v. Hart*, 3 Des. Eq. 592; *Greenfield's Estate*, 14 Pa. St. 489; *Willis v. Matthews*, 46 Tex. 478; *Shobe v. Carr*, 3 Munf. 10; *Stokes v. Oliver*, 76 Va. 72; *Halsey v. Peters*, 79 Va. 60; *Griggsby v. Osborn*, 82 Va. 371; *Beall v. Clark*, 71 Geo. 818; *Jones v. Clark*, 59 Geo. 136; *Irwin v. Dyke*, 114 Ill. 302; *Warren v. Warren*, 105 Ill. 568 (for services rendered donor); *Packwood v. Dorsey*, 6 Rob. (La.) 329 (see for requisite formalities under code); *Deschappelles v. Labarre*, 3 La. Ann. 522 (confirmation by heirs under Louisiana code). There are a few cases in which it is held that there cannot be a parol gift of lands. Occasionally a case is cited as holding that view, which upon close examination is found to have gone off on some question essential to the enforcement of a parol gift, leaving untouched

So where a son was to go on an eighty-acre tract, improve it, paying a certain share of the crops during the father's life, at whose death the son was to have it, a decree for specific performance was entered against the heirs.¹ So where a cemetery lot was purchased by a husband, to be used as a place of burial for himself, his wife, and family; and both he and she expended money thereon, greatly improving it; and her son and parents and his brother were buried therein; it was held that a court of equity would enjoin a sale thereof by the husband upon her petition, chiefly upon the principle that it had been devoted to the purpose of a family burial-place and his action had induced her to expend a large sum of money thereon.² So where J. W. B., a widower, a locatee of the Crown, agreed with J. B., his son, to assign his interest in the land on condition of the son making certain payments and performing certain services, which were all duly made and performed; and afterward the patent was issued in the name of J. B., by which name the father was known to the officers of the land-granting department; but before issuing the patent the father married, and the son, in addition to making the payments and performing the services, erected valuable improvements, it was decided that the second wife was not entitled to dower in such land, the

the general question. Thus in Alabama equity will not enforce the specific execution of a parol gift of land: *Conn v. Prewitt*, 48 Ala. 636; *Pinckard v. Pinckard*, 23 Ala. 649; *Evans v. Battle*, 19 Ala. 398; *Forward v. Armstead*, 12 Ala. 124; *Collins v. Johnson*, 57 Ala. 304; *Hubbard v. Allen*, 59 Ala. 283; *Ridley v. McNairy*, 2 Humph. 174; *Rucker v. Abell*, 8 B. Mon. 566.

For other cases touching parol gifts of real estate, see *Harrison v. Harrison*, 15 S. E. Rep. 87; *Crittenden v. Canfield*, 87 Mich. 152; *Blalock v. Miland*, 87 Geo. 573; *Wootters v. Hale*, 19 S. W. Rep. 134 (gift to infant); *Sourwine v. Claypool*, 138 Pa. St. 126.

¹*Smith v. Yocum*, 110 Ill. 142; *Bohanan v. Bohanan*, 96 Ill. 591; *McDowell v. Lucas*, 97 Ill. 489; *Langston v. Bates*, 84 Ill. 524. Such instances are more a contract than a gift, and they are so treated: *Knapp v. Hungerford*, 7 Hun, 588.

²*Schroder v. Wanzor*, 36 Hun, 423.

father being a trustee for the son.¹ So where a father put his son in possession of a plantation and slaves, and permitted him for three years to appropriate the crops for his own use, it was held that the crop of the fourth year, as well as the preceding three, were to be considered as gifts from the father to the son, and liable to the claims of the latter's creditors.² A father desired to give his daughter, on her marriage, a sum of money, but she preferred the gift to be in land. He then gave her husband a sum of money, and he told his wife of its receipt, and, with her consent, used it in his business. A year afterward the father and husband purchased a farm together, part cash and part on time, and a bond for a deed was executed to the father, the deed to be made to him alone. The daughter and husband took possession of the farm with the father's consent, and so remained until suit brought. The husband became insolvent, and the father by deed gave the land to a son, in trust for the daughter during her life, and remainder to her child. The daughter sought to set the deed aside, and procure a conveyance in her favor; but the court held that at the best she was entitled to such an interest as her money bore to the entire purchase-money; and as to the remainder there never was a gift.³ So where a father verbally gave his married daughter land and put her and her husband into possession of it, and shortly after the land was sold by the daughter and her husband, the father ratifying the sale by the execution of a deed therefor to the purchaser, and the husband received the purchase-money and delivered it to the daughter, his wife, this was held to be a good gift of the proceeds.⁴

¹ *Burns v. Burns*, 21 Gr. Ch. (U. C.) 7.

² *Skinner v. Skinner*, 4 Ired. L. 175.

³ *Crawford v. Manson*, 82 Geo. 118.

⁴ *Chachere v. Dumartrait*, 2 La. 40. A verbal agreement between a brother and

373. EXPENDITURE OF LABOR.—An expenditure of labor upon the land is sufficient, if of a suitable kind. If the condition is to put up certain kind of improvements, then it is immaterial how they are put up—whether by the expenditure of money or labor, unless there is a specific stipulation to that effect. And even where no stipulation whatever is made with regard to the expenditure of money or labor, it is immaterial what kind of labor is performed, so long as it is of that character or kind which the donee would not have expended if the property had not been given to him, and which an owner himself would be likely to have done. Labor expended to clear up a farm in the forest, or to drain swampy land, or to break and bring into subjugation wild prairie land, is as potent in rendering the gift irrevocable as the building of fences, houses, or barns.¹

374. DONOR STIPULATING FOR EXPENDITURE ON THE LAND GIVEN.—Where the donor stipulates for the expenditure of money or labor upon the premises given, especially where specifically designated in amount, the gift is held peculiarly binding upon the donor. “And equity protects a parol gift of land, equally with a parol gift to sell it, if accompanied by possession, and the donee,

a sister that the latter will give her land to the former in consideration of \$100 per year and her living with him on the land, which she does for many years, during which time she makes declarations that she intends her brother to have her land at her death, is neither a gift nor a valid contract: *Glass v. Gaines*, 17 S. W. Rep. 161; S. C. 15 S. W. Rep. 877.

A father desiring his married daughter to have a house, told her to look at one, which she did, and he then said to her: “It is for you I am buying it.” He bought it, and took title in his own name. She made some improvements, not exceeding the rents, lived in the house for three or four years, during which time the father paid the taxes, except for one year. It was held that there was no gift: *Schoonmaker v. Plummer*, 29 N. E. Rep. 1114.

¹ *Neale v. Neale*, 9 Wall. 1; *Dawson v. McFaddin*, 22 Neb. 131; *Stewart v. Stewart*, 3 Watts, 253; *Hardesty v. Richardson*, 44 Md. 617; S. C. 22 Am. Rep. 57.

induced by the promise to give it, has made valuable improvements on the property. And this is particularly true where the donor stipulates that the expenditure shall be made, and by so doing this makes it the consideration or condition of the gift.”¹ Thus where a father agreed with a son, that if he would go onto a twenty-five acre woodland, clear up a part of it and live thereon, he would give him a deed for it as soon as he had done a certain portion of the work ; and the son took possession, cleared it up, paid the taxes, and erected valuable buildings thereon, the father was not permitted to resume possession thereof.² Indeed, it is said that in such an instance the donee is a purchaser for a valuable consideration,³ and so in fact he is ; and the later and better authorities treat the entire transaction as a contract and not as a gift.

375. A PROMISE TO GIVE IS NOT SUFFICIENT—DONOR RETAINING CONTROL OF THE PROPERTY.—It is well, in this connection, to distinguish between a mere promise to give in the future and the act of gift itself. “A mere intention, though expressed, as to a future disposition of a man’s property, creates no legal obligation upon him to carry out that intention ; and until the intended gift is made, he may change his mind respecting it.” This was said in a case where a father promised a son to give him a tract of land for past services ; and when the son desired and did take possession, refused to give him a deed for the tract, because he was dissatisfied with his marriage. But the son took possession, and improved the land. The

¹ *Neale v. Neale*, 9 Wall. 1 ; *Dawson v. McFaddin*, 22 Neb. 131 ; *King v. Thompson*, 9 Pet. 204 ; *Bright v. Bright*, 41 Ill. 97 ; *France v. France*, 4 Halst. Eq. (N. J.) 650 ; *Lobdell v. Lobdell*, 36 N. Y. 327 ; S. C. 33 How. Pr. 347 ; 4 Abb. Pr. (N. S.) 56 ; *Freeman v. Freeman*, 8 Amer. L. Reg. (N. S.) 29.

² *France v. France*, 4 Halst. Eq. (N. J.) 650 ; *Lobdell v. Lobdell*, *supra*.

³ *Moore v. Small*, 19 Pa. St. 461.

court declined to grant him relief.¹ So where a testator placed his two sons in possession of certain portions of his land, intending to convey or devise the same to them, but retained full control of the property, notwithstanding which they made valuable improvements upon their respective portions, it was decided that they neither took the land, nor were they entitled to pay for the improvements.² Thus a mother urged her son, about leaving home, to remain, work on the farm, assist her in bringing up the family, and she would give him the south half of the farm, and the other half to a younger brother, on condition that the former would support her during life. In consequence of this promise he remained with the family and built a brick dwelling on the south half of the farm, of which house he agreed and did give to his mother a certain part for her use and the use of a granddaughter living with her. The brothers and sisters were all aware that this brother claimed under the alleged agreement or promise; and the south half of the farm was always designated as his. The son fulfilled his part of the agreement, until his mother died, seven years afterward. But this was held not to entitle him to a specific performance of the agreement, the mother having died without executing a deed therefor; because the agreement to convey was only a promise or expectation held out to the son to induce him to remain with her, and as such, was not capable of being specifically enforced.³ While representations made by one party and acts done by another upon the faith of such representation may constitute a contract which will be specifically executed; yet where the repre-

¹ *McKay v. McKay*, 15 Gr. Ch. (U. C.) 371.

² *Foster v. Emerson*, 5 Gr. Ch. (U. C.) 135. Upon another point, this case is probably no longer an authority. See *Keffer v. Keffer*, 27 C. P. U. C. 257.

³ *Orr v. Orr*, 21 Gr. Ch. (U. C.) 397. See the other phase of this case in *Orr v. Orr*, 31 Q. B. U. C. 13.

sentations are merely of a future intention, as to which the party refuses to bind himself by contract, the engagement must be regarded rather as of an honorary character, and not enforceable as such in a court of equity.¹ "Such a promise or gift in the case of a parent, in its very nature leaves to the donor a *locus penitentiæ*, a right to change and revoke or modify the gift, a right which the exigencies of his fortune or his family may make it proper for him to exercise."²

376. GIFT OR CONTRACT.—It is very often difficult to determine whether a transaction shall be viewed as a gift or a contract; in fact, many of them are partly gifts and partly contracts. Thus S, intending to give F certain lands, executed an instrument for the sale and conveyance of the lands to her on payment of \$1,100, which she agreed to pay. It was never intended that she should pay anything, and S subsequently indorsed upon the instrument a receipt in full of the purchase price; no money was in fact paid. It was decided that this was not a voluntary agreement to convey, that it was for a valuable consideration, and did not operate as a gift of the land, and conclusively rebutted an intent to make a present of the land; but was a present of the debt, the receipt operating as a valid gift of the debt, leaving the right of F to a conveyance in force, as if the debt had been

¹ *Cox v. Cox*, 26 Gratt. 305.

² *Taylor v. Staples*, 8 R. I. 170; S. C. 5 Am. Rep. 556; *Rucker v. Abell*, 8 B. Mon. 566; *Pinchard v. Pinchard*, 23 Ala. 649; *Adamson v. Lamb*, 3 Blackf. 446; *Pope v. Dodson*, 58 Ill. 360. Courts will not enforce an unexecuted gift, nor an executory decree in its nature a family settlement; if the decree provides within itself no means for its execution, seems to be an imperfect creation of a trust or gift, it will not be enforced, even if such had been intended; and when voluntary, it is subject to revocation: *Wadhams v. Gay*, 73 Ill. 415. It is especially true that the gift is not binding when the use of the property is ample compensation to the promisee for his improvements and taxes paid: *Walton v. Walton*, 70 Ill. 142; *Hickman v. Grimes*, 1 Marsh. (Ky.) 86; *McMahill v. McMahon*, 69 Ia. 115.

paid.¹ A concession of land by the public to an individual if he will fence and build upon it, is a gift; although he is required to pay the government the cost of surveying and patenting it.²

377. DONOR INDUCING DONEE TO CHANGE HIS CONDITION—WILL—CONTRACT.—If a donor, by promises, induces the donee to change his position, to his detriment, after the change is made the donor can be compelled to make his promises good. The relation between them then becomes one of contract. Thus it has been said: "A representation may be so made as to constitute the ground of a contract. But is it so here? Where a person makes a representation of what he says he has done, or of some independent fact, and makes that representation under circumstances which he must know will be laid before other persons who are to act on the faith of his representation being true, and who do act on it, equity will bind him by such representation, treating it as a contract. Suppose that this gentleman had on the eve of the marriage said to the appellant: 'You may safely enter into this marriage, for I have executed a deed by which I engage to leave you such and such estates.' If on the faith of that representation the nephew had married, the uncle would then have made a representation on which he knew that his nephew would act, and it would be a fraud on the nephew, or on those who deal with him, and come after him, to set up as an answer that that was a mere intention which he had entertained at the time. The uncle would, in fact, have made a contract, and he would be compelled to make it good, for he would have made a

¹ *Ferry v. Stephens*, 66 N. Y. 321; reversing 5 Hun, 109. See *Gray v. Barton*, 55 N. Y. 68.

² *Noe v. Card*, 14 Cal. 576; *Scott v. Ward*, 13 Cal. 458; *Chew v. Calvert*, 1 Walk. (Miss.) 54. *Contra*, *Yates v. Houston*, 3 Texas, 433.

representation with a view to induce others to act upon it, and on the faith of it they had, at the moment, acted. That would be a representation which, under the circumstances I have stated, would be in fact a contract. There is no middle term, no *tertium quid*, between a representation so made, to be effective for such a purpose and being effective for it, and a contract; they are identical. That which leads to the representation being made and acted on determines its nature, gives it the character of a contract, or leaves it a mere representation.”¹ Relying upon these rules it was decided in Canada that where the owner of real estate wrote to his son that he had devised certain portions of the property to him, and expressed a desire that he would leave his then place of residence and settle on the devised property, by the deviser, and that if he did so the will should in that respect remain unchanged; and the son, acting upon the desire of the father, left his residence and went to live beside his father, it was held that the will was no longer revocable.² So a promise was made to give B a certain tract of land in case he married C, and after the marriage a bond was executed to that effect, containing a recital that the obligor desired the land to go to the male issue of B and C. It was held that the only female issue of B and C, on its father’s death, its mother joining therein, could enforce a specific performance of the contract, and that the clause with relation to the descent of the property to the male issue was not obligatory upon the donees.³ As a rule,

¹ Maunsell v. White, 4 H. L. Cas. 1039; S. C. 1 J. & L. 539; 7 Ir. Eq. R. 413; Dillwyn v. Llewelyn, 8 Jur. N. S. 1068; S. C. 10 W. R. 742; 6 L. T. N. S. 878; 4 De G., F. & J. 517; Jordan v. Money, 5 H. L. Cas. 185; S. C. 23 L. J. Ch. 865; Money v. Jordan, 2 De G., M. & G. 318; S. C. 21 L. J. Ch. 893; Hammersley v. De Biel, 12 Cl. & F. 45; affirming 3 Beav. 469; Coles v. Pilkington, 44 L. J. Ch. 381; S. C. 19 L. R. Eq. 174.

² Fitzgerald v. Fitzgerald, 20 Gr. Ch. (U. C.) 410.

³ Boyd v. Shouldice, 22 Gr. Ch. (U. C.) 1.

however, mere entry into possession, unless, possibly, under some very unusual and exceptional circumstances, will not warrant a decree of specific performance.¹ Thus where the owner of land said to the claimant, who was in possession of the house and lot: "I give this to you; you may do as you please with it," in substance, giving her the keys, and within a year the house burned down, and the plaintiff moving away for shelter to another house, the owner's widow entered on the lot and built a new house on the site of the old one, and the claimant, when the new house was completed, moved into it surreptitiously by the back door late in the evening, it was held that there was no completed gift, even though the gift was coupled with a condition that the claimant was to take care of her own child. This condition was regarded as not adding anything to the force of the gift, for the claimant was in duty bound to do so any way, and the promise raised no consideration for the gift.²

378. GIFT NOT INDUCING DONEE TO CHANGE HIS CONDITION NOR TO EXPEND MONEY OR LABOR THEREON.—Since the gift is held good in equity upon the ground that it has induced the donee to change his situation or condition, or to expend money or labor upon the land given, so that it would be inequitable to allow the donor to rescind it, it necessarily follows that if it has not induced the donee to change his position, nor to expend labor or make valuable improvements thereon, the gift is void, and cannot be enforced neither against the donor or against his creditors.³

379. SLIGHT OR TRIVIAL IMPROVEMENTS—RENTS A FULL COMPENSATION.—If the improvements are slight or

¹ *Oggsbury v. Oggsbury*, 115 N. Y. 290, 295.

² *Anson v. Townsend*, 73 Cal. 415.

³ *Stokes v. Oliver*, 76 Va. 72; *Griggsby v. Osborn*, 82 Va. 371.

trivial, when there is no agreement touching them, or the labor nothing beyond the cultivation of the soil, or insignificant in comparison with the value of the land, there is no equity raised in favor of the donee. The rule even goes farther. For if the rents and profits derived by the donee from the land by virtue of his possession are a sufficient return for the money or labor expended in permanent improvements, equity will not decree a specific performance. But it is clear that only profits in such an event can be taken into consideration, using the word rents in that sense; for if the profits were not equal to the labor expended or expense incurred in securing them, or if they were no more, then the donee would reap nothing for his labor or money expended in permanent improvements; and it would be a manifest injustice to not compel the donor to perfect his gift.¹ But it will not do to allow the profits to bear too much weight; for, as it has been held, compensation for the improvements or labor is not a bar to an action for a specific performance.² Indeed, it was held in one case that the improvements must add to the permanent value of the land;³ and where the benefits to the donee by the possession of the land exceed his expenditure upon it, a specific performance will

¹ No particular case can be cited for all the distinctions drawn in the above section, but the sum total of the bulk of these cases are as we have stated the rules therein: *Dawson v. McFaddin*, 22 Neb. 131; *Hardesty v. Richardson*, 44 Md. 617; S. C. 22 Am. Rep. 57 ("improvements of considerable extent"); *Eckert v. Eckert*, 3 P. & W., p. 332; *Young v. Glendenning*, 6 Watts, 509 ('slight and temporary erections for the tenant's own convenience doubtless give no equity'); *Atkinson v. Jackson*, 8 Ind. 31; *Burns v. Sutherland*, 7 Barr, 103; *Moore v. Small*, 19 Pa. St. 461, 470; *Moore v. Pierson*, 6 Iowa, 279; S. C. 71 Am. Dec. 409; *Porter v. Allen* 54 Geo. 623; *Ackerman v. Ackerman*, 24 N. J. Eq. 315; affirmed, *Ib.* 585; *Oggsbury v. Oggsbury*, 115 N. Y. 290.

² *Young v. Glendenning*, 6 Watts, 509; S. C. 31 Am. Dec. 492, citing *Forster v. Hale*, 3 Ves. 696.

³ If the improvements were destroyed after erected by the donee, that could in no wise affect the case afterward brought, for the donee is still a greater loser by not having the gift enforced.

not be decreed.¹ When the donor and donee are related by blood, slight improvements, if valuable and permanent in character, will be sufficient.² The improvements, however, must not only be substantial, permanent, and valuable, but such as an owner would ordinarily make upon the estate under like circumstances; yet, whether slight or extensive, they will not serve the purpose unless of real value, nor unless they were made by or for the donee pending his possession, and upon the faith of the parol gift sought to be set up and enforced.³

380. EXPENDITURES MUST BE MADE IN CONSEQUENCE OF AND RELYING UPON THE GIFT.—Since the courts enforce the gift by decreeing a specific performance, because of the fact that the words and the acts of the donor have induced the donee to spend labor and money that he would not have otherwise done, it must be clearly shown that the expenditure was made in consequence of the gift; or, perhaps, in part in consequence of it.⁴ Thus a promise to give a farm by will, followed by expenditure in improvements, not, however, in execution of the contract or at the promisor's request, cannot be enforced.⁵

381. GIFT AFTER IMPROVEMENTS MADE OR LABOR EXPENDED.—The improvements must have been made or

¹ *Wack v. Sorber*, 2 Whart. 387; S. C. 30 Am. Dec. 269; *Glass v. Gaines*, 17 S. W. Rep. 161; S. C. 15 S. W. Rep. 877.

² *Hughes v. Hughes*, 72 Geo. 173.

³ *Porter v. Allen*, 54 Geo. 623.

⁴ *Dawson v. McFaddin*, 22 Neb. 131; *Guynn v. McCauley*, 32 Ark. 97; *Grigg-by v. O-born*, 82 Va. 371; *Hardesty v. Richardson*, 44 Md. 617; S. C. 22 Am. Rep. 57; *Mims v. Lockett*, 33 Geo. 9; *Eckert v. Eckert*, 3 P. & W. 332; *West v. Flanagan*, 4 Md. 36; *Murphy v. Stell*, 43 Tex. 123; *Porter v. Allen*, 54 Geo. 623; *Beall v. Clark*, 71 Geo. 818; *Jones v. Clark*, 59 Geo. 136; *Irwin v. Dyke*, 114 Ill. 302; *Johnston v. Johnston*, 19 Ia. 74.

⁵ *McClure v. McClure*, 1 Barr (Pa.), 374. This was chiefly upon the ground that it was a contract without consideration.

labor expended upon the faith of the gift; and if not so done, there is no gift. Thus if possession is taken and improvements made, a subsequent parol gift will not be enforced; for the gift did not induce the erection of the improvements. And in such an instance, where the alleged donor and donee are father and son, it will be presumed that the son relied upon his father recompensing him by a devise of the land, rather than by a gift during his lifetime; and if the father disappointed him, the son is without recourse, at least so far as the title of the land is concerned.¹ This is very well illustrated by a Canadian case. In that instance a father told a son he would give him a tract of land for work he had done for him after becoming of age. Two years afterward the son went, on his marriage, into possession, with his father's permission, but after he had refused to give him a deed, or to part with the control of the property. After the refusal of the deed, the son put up a log barn on the land. The son sought to hold the property on the ground, in addition to another, that he had erected valuable buildings,—the log barn, after going into possession; but the court denied his right to thus claim the land, for he had put them up after a distinct refusal of the father to make the gift.²

382. POSSESSION WITHOUT IMPROVEMENTS MADE OR LABOR EXPENDED MAY BE SUFFICIENT—FREE OF INCUMBRANCE.—Mere possession without labor expended or improvements made may be sufficient to establish the gift. Thus where the donor offered his son-in-law, who was living and in a successful business in another town, that if he would move to his, the donor's, place of resi-

¹ *Eckert v. Eckert*, 3 P. & W. 332; *Eckert v. Mace*, 3 P. & W. 364, note; *Adamson v. Lamb*, 3 Blackf. 446.

² *McKay v. McKay*, 15 Gr. Ch. (U. C.) 371.

dence, he would give his, the donee's, wife a lot and an unfurnished house thereon; and the donee accordingly did move at an expense, furnish the house with his own and wife's earnings, and occupied it twelve years; this was held to be such a gift that the subsequent insolvency of the donor did not render his formal conveyance of the lot, at that time, void; nor render it liable to the lien of a judgment rendered against him at the end of the twelve years.¹ If the condition is that the donee must not only take possession, but must make improvements; then he must not only show a possession in himself, but the erection of the improvements.² But where a father orally promised his daughter, in view of her coming marriage, that he would give her a designated house; and immediately after that event put her and her husband in possession of it; and there was an incumbrance upon it, payable in installments, part of which the father paid before his death, it was decided that the remainder due must be paid out of his estate; for the part performance took the case out of the statute of frauds, and the promise was in effect to give the house free from incumbrances.³

383. ADVERSE POSSESSION AFTER GIFT MADE.—Possession of land retained for a long time after the gift made, although no improvements are erected or labor expended thereon, where the donee is claiming the land all the time as his own, will give such donee a complete title to the

¹ *Burkholder v. Ludlam*, 30 Gratt. 255; S. C. 32 Am. Rep. 668; *Law v. Henry*, 39 Ind. 414 (improvements also erected); *Halsa v. Halsa*, 8 Mo. 303.

² *Bright v. Bright*, 41 Ill. 97; *Frame v. Frame*, 32 W. Va. 463.

³ *Ungley v. Ungley*, 4 Ch. Div. 73; S. C. 46 L. J. Ch. 189; 25 W. R. 39; 35 L. T. (N. S.) 619; 19 Moak, 678; affirmed 5 Ch. Div. 887; S. C. 46 L. J. Ch. 854; 25 W. R. 733; 37 L. T. (N. S.) 52.

Where a father and children were tenants in common, and he made sundry payments for the preservation and protection of the joint property, it was presumed that such payments were gifts: *Chase's Estate*, 7 Pa. C. C. 298.

land. Thus where A made a lease for a lot of ground to B for a term of one year, at the nominal rent of \$1, and afterward by his acts and declarations showed that he had given the lot to B as a reward for past services, corroborated by the facts that the latter had occupied the lot ever since, claiming it as his own for more than twenty-one years, and that it had been taxed in his name and the taxes paid by him, it was held that these facts constituted a perfect gift of the lot to B. "So long a possession," said the court, "without the payment of rent cannot be accounted for by the lease. It was so long that the defendant might have relied on it alone for a legal title, and surely it was enough to save him from the necessity of any distinct evidence of the gift, and of the possession being delivered in pursuance of it."¹ So a father, in 1859, told his married son to go and live on a certain fifty-acre tract, and the son did so, clearing it up, erecting two dwelling-houses thereon, spending \$500 of his wife's money in so doing. The son expected and believed that the land was to be his, and the father stated, but not to him, that he intended it to be the son's after his death. Without such expectation the son would not have moved on the land. In 1865 the son, desiring to raise some money on the land, procured his father to execute a mortgage on it for the amount desired; the son received the amount, and paid it off with yearly interest by 1871. There were, however, no communication between the son and the mortgagee. In 1876 the father demanded rent of the son, which was refused on the ground that the latter owned the land. The father then brought an action for possession; but the court decided that the son became upon entry a tenant at will to his father, and that the statute of limitations began to run a year from that date, ripening

¹ Mahon v. Baker, 26 Pa. St. 519.

into a perfect title in 1870; that by the execution of the mortgage neither father nor son intended thereby to make any change in the nature of the son's possession, or to create a new tenancy, for which there was no necessity in the interest of the mortgagee; that the existing tenancy at will therefore was not thereby determined, nor any new tenancy at will created; that even if it had been so created, the statute would have begun to run again in 1866, and would have been a bar in 1876.¹ A joint possession, however, with the donor cannot amount to an adverse possession.² Not altogether in line with the foregoing cases are the cases in Alabama, where it is held that "a parol gift of lands creates a mere tenancy at will, and may be revoked or disaffirmed by the donor, unless an adverse possession under it had continued for the statutory period, which bars an entry into lands."³ But after making this statement the court proceeds and says: "An uninterrupted, continuous possession by a donee, under a parol gift, accompanied by a claim of right to the lands, is adverse to the donor, and will be protected by the statute of limitations. To convert such possession into an adverse possession, hostile to the title of the donor, there must have been, for the period prescribed by the statute of limitations, a claim of right asserted by the donee, and an absence of recognition of the title of the donor. If during the possession the donee has recognized the title of the donor, and acknowledged its superiority, the possession is not adverse."⁴ In the case of a father and son it is said that his possession

¹ *Keffer v. Keffer*, 27 C. P. U. C. 257. The court cites many cases, and declines to follow *Foster v. Emerson*, 5 Gr. Ch. 135. See, to same effect, *Vincent v. Murray*, 15 N. B. 375.

² *Orr v. Orr*, 31 Q. B. U. C. 13.

³ *Jackson v. Rogers*, 2 Cai. Cas. 314; *Boykin v. Smith*, 65 Ala. 294.

⁴ *Collins v. Johnson*, 57 Ala. 304; *Moore v. Webb*, 2 B. Mon. 282.

however long continued, does not become adverse, until asserted so openly and notoriously so as to raise the presumption of notice to the donor; and if, after his father's death, he as administrator joins with his co-administrator in obtaining an order for the sale of the lands, this is a distinct recognition of his father's title, and his subsequent possession is held in subordination to it as purchaser.¹ But where it was shown that a single woman took possession of the land under an alleged verbal gift from an uncle, and occupied them for twenty years, but never did anything without consulting him, during that period; that she told her friends she owned the land, and actually let a portion, with his approval, and collected the rents; that, as she testified, "as regards the tenants, to them I always acted as owner;" that the members of her father's family, who lived with her part of the time, paid her no rent; that she did "papering or whitewashing, or some-

¹ *Boykin v. Smith*, 65 Ala. 294. It is well to observe that in Alabama no action can be maintained to specifically enforce a parol gift of lands: *Conn v. Prewitt*, 48 Ala. 636; *Bakersfield, etc., v. Chester*, 55 Cal. 98 (in a claim of ownership asserted and maintained). Under the Georgia code, in case of a claim of a gift by a son from his father, the former must show that he had an exclusive possession, without the payment of rent, continuously for seven years during the lifetime of the father; and if the father die before the seven years are completed the conclusive presumption of ownership provided for therein does not exist: *McKee v. McKee*, 48 Geo. 332; *Peall v. Clark*, 71 Geo., p. 818. But this with relation to the length of time, applies to an instance where no valuable improvements are made; for if valuable improvements are made the seven years' limitation does not apply: *Hughes v. Hughes*, 72 Geo. 173. The presumption is not confined to a gift by writing; it arises in a parol gift. The assertion of dominion by the father relates to that over the property itself, and not merely over the paper title: *Johnson v. Griffin*, 80 Geo. 551, modifying *Jones v. Clark*, 59 Geo. 136. In *Walsh v. McIntire*, 68 Md. 402, it was held "that a party cannot acquire a title, which is maintainable at law, by parol gift followed by actual possession, no matter how long and exclusively continued." *Contra*, *Davis v. Bowmar*, 55 Miss. 671.

That a party going in possession under a parol gift may obtain possession by adverse possession, see *Thompson v. Thompson*, 20 S. W. Rep. 373; *Spradlin v. Spradlin*, 18 S. W. Rep. 14; *Davis v. Davis*, 68 Miss. 478.

thing like that " to the premises ; that her uncle paid the family expenses before and during the twenty years, she claiming she was the owner of the land till he died ; that he paid for insurance, water-rates, repairs, and taxes, which were assessed to him, and afterward to his heirs ; and that sisters and uncles, who acknowledged his ownership, occupied part of the premises rent free before and after she took possession, one of whom, as alleged donor's agent, collected rents of certain tenants, contracted for repairs, and paid therefor with money furnished by him ; it was decided not to authorize a finding that the tenant acquired a title by adverse possession.¹ Yet where there was evidence of a parol gift, and exclusive possession by the donee for twenty years, under a claim of ownership, the donor making no claim for rent or otherwise, the donee moving and repairing the buildings, putting a lightning-rod on the house, rebuilding fences, setting out fruit trees, employing men for nearly two years in cutting off bushes, always paying the taxes, frequently working for the donor, and always receiving pay therefor, no part being retained, or attempted to be retained, for rent of the premises, and the donor paying for the pasturage of his cow on the premises ; it was held that there was evidence from which a jury was justified in finding that the donee had title by adverse possession.²

384. CONFIRMING GIFT BY WILL.—It is no uncommon thing for a donor to confirm a gift, by the subsequent execution of his will, expressly devising the land given to the donee. In such an event, the donor does what the law would have compelled him while alive to do, or would compel his heirs to do. He does not, by the will, give the

¹ *Duff v. Leary*, 146 Mass. 533.

² *Wheeler v. Laird*, 147 Mass. 421.

land to the donee ; that he has already done ; but he gives him the legal title, as distinguished from the land itself. He gives him no better control over the physical thing than he gave before ; but he simply clothes him with the legal title and nothing more.¹

385. TITLE ACQUIRED BY DONOR AFTER GIFT MADE.—A donor had possession of land, but no title thereto. His right to the land was an inchoate one, for it was government land ; but he had reasonable and well-grounded hopes, founded on the laws of Congress, that his title would be made perfect, and be completed, either by a donation from the government, or by a right of pre-emption. While thus in possession, he gave it to the donee, put him in possession, and afterward received from the government a certificate of confirmation, specifying the location of the claims. Under these circumstances it was held that the donor could be compelled to transfer all his rights to the land to the donee, even before a patent was granted.²

386. POSSESSION BY THE DONEE MUST BE CLEAR.—In order to entitle him to relief, the donee must have clear possession of the land he claims. Indeed, it is said that it “ must be very clear and definite, such as would characterize the action of an owner and be inconsistent with the hypothesis of a mere license ; for in this class of cases equity dispenses with a writing only when definite and unequivocal facts exist which point with certainty to a prior parol agreement of gift or sale and serve to indicate its existence, and so may be taken as a substitute for the usual written evidence.” Consequently a mere

¹ *Daniel v. Frost*, 62 Geo. 697. See *Dunnage v. White*, Wils. Ch. 67.

² *Rhodes v. Rhodes*, 10 La. 85 ; *Burns v. Burns*, 21 Gr. Ch. (U. C.) 7.

license to cut wood and boil sugar-water was held not to be such a possession as the law required.¹ But where a father promised his daughter that if she would live with and care for his family he would give her his farm which they lived upon, and he frequently declared that the farm was hers; and she lived thus with him thirty-eight years, he apparently managing and running the farm in his own interest entirely, it was held that she had such a possession as entitled her to it at his death; and to require her to turn him out and take an exclusive possession of it would be to require her to do an unnatural and unfilial thing, which the law does not exact in order to preserve her rights.²

387. GIFT INCOMPLETE WITHOUT POSSESSION TAKEN—INTENTION TO GIVE.—As in the case of a chattel, the donee must assume the possession of the land given, in order to render the gift valid. Indeed, there must be a present intention on the part of the donor to give, a complete renunciation of his right and dominion over the land, without power of revocation, and a full delivery of the possession.³

388. GIFT TO WIFE BUT POSSESSION TAKEN BY HUSBAND—ADVERSE POSSESSION.—A wife cannot obtain title by adverse possession where possession is claimed by her husband. Thus, the owner of land gave it by parol to a married woman. She was married at the time, and she and her husband at once went and lived on the farm together. The husband farmed it as his own, and the wife merely resided with him as his wife. It was claimed that she had title by adverse possession, but the court decided

¹ *Ogsbury v. Ogsbury*, 115 N. Y. 290; *Griggsby v. Osborn*, 82 Va. 371.

² *Warren v. Warren*, 105 Ill. 568.

³ *Mims v. Ross*, 42 Geo. 121; *Beall v. Clark*, 71 Geo. 813.

that if title was obtained by such a possession, the husband and not she obtained it.¹

389. DONOR REGAINING POSSESSION.—If the donor regains the possession of the land given, it may or may not operate as a revocation of the gift. A temporary repossession, however, with the consent of the donee, express or implied will not defeat the gift.² But if the donee has taken possession, erected buildings, built improvements, or expended labor thereon, so that a court of equity could decree a specific performance of the agreement between them at the time the donor resumed possession, then a forcible resumption of the possession by the donor will not defeat the right of the donee to insist upon the validity of the gift; yet if the donee voluntarily relinquish the possession or by some act evidencing it acquiesce therein, the donee will lose his right to insist upon the validity of the gift. He would, however, in the latter event, be entitled to recover the value of the improvements,³ unless he abandoned them. But if, at the time the donor forcibly resumes the possession, a court of equity would not grant the donee a specific performance of the agreement, then the donee is without relief; for the donor, by such an act, has revoked the gift, which he may do at any time before the court would grant the donee a specific performance of the agreement. A forcible repossession by the donee, under such circumstances, would not re-invest him with the corpus of the gift. By no act of his can that be done.

¹ *Vincent v. Murray*, 15 N. B. 375. This was upon the theory that he as her husband was entitled to the possession of her real estate; but if her disabilities were removed, would not their jointly living on the property be her possession? Is she bound to live apart from him, and on the land given, in order to acquire title?

² *Daniel v. Frost*, 62 Geo. 697.

³ See *Duckett v. Duckett*, 71 Md. 357.

If the donee has made improvements, and the donor regains the possession, he will be required to reimburse the donee for his outlay.¹ Where the gift was to the wife, and the husband put up improvements, the latter was allowed to recover an amount equal to the value the improvements added to the land, but was not allowed to recover for the value of the improvements.²

390. DONEE ABANDONING GIFT.—It is altogether possible for the donee to abandon the gift after accepting it. This is peculiarly so where the gift is coupled with a condition, which the donee declines to perform after yielding an acceptance. Thus a father, owner of one hundred acres of land, with the view of retaining his son upon the property and settling him in life, agreed to convey to him one-half of this land, for one-third of its value, payable in six years with interest, and executed a bond for that purpose. After obtaining the bond, the son went to work about the country, resided several years at a distant part thereof, sometimes returning when out of work and residing in his father's family, and during such residence was in the habit of assisting in doing the usual work of the farm, which consisted of the one hundred acres. He paid no part of the purchase-money, but claimed that he was entitled to a credit thereon because of services thus rendered. Ten years afterward he sought to enforce the contract, but the court decided that he was not entitled to its enforcement; first, because of his laches; second, because he had abandoned the gift.³ So where a son relinquished his own farm and went to take care of his father, at his request, during his life, upon the condition of having the farm given to him; and after remaining a few days, left tem-

¹ *Hamilton v. Hamilton*, 5 Litt. 28; *Rucker v. Abell*, 8 B. Mon. 566.

² *James v. McKinsey*, 4 J. J. Mar. 625.

³ *Evans v. Evans*, 2 E. & A. U. C. 156.

porarily, and during his absence his son and wife moved away, owing to some disagreement between them and the donor, and the donee died before he returned, it was held that the gift, although in fact a contract, was inoperative; nor had there been such a part performance as entitled the heirs of the donee to have it enforced.¹ So where the donee was to support the donor, but went into the army and died, after having supported him for twelve years; and the donee's wife, unable to agree with the donor, moved away and left the land, it was held that she, on the donor's death five years after the donee's, and the donor failing to make a will as he had agreed to, could not enforce the agreement.²

391. DONOR INCUMBERING LAND.—While the donee in possession will be protected from all acts of the donor impairing or incumbering his title, even as against subsequent grantees or execution creditors; yet the donee will not be protected as against a subsequent mortgage given by the donor, it was held, of which such donee had full knowledge, as also of its foreclosure and the sale of the land thereunder, and entered into negotiations for its redemption therefrom, and made no claim to the mortgagees of the invalidity of their security as against his occupancy or title.³

392. DONOR RESERVING RENT—TAXES PAID BY DONOR.—If the donor expressly reserves a yearly rent, for a term or during his life, this will not necessarily defeat the gift. Neither does the payment of taxes by the donor defeat it. “The fact that William Lucas,” said the Supreme Court of Illinois, “paid his father one-third of

¹ *Black v. Black*, 2 E. & A. U. C. 419, reversing 9 Gr. Ch. 403; *McDonald v. Rose*, 17 Gr. Ch. 657.

² *Cox v. Cox*, 26 Gratt. 305.

³ *Potter v. Smith*, 68 Mich. 212.

the crops each year raised on the land, and the latter paid the taxes, does not militate against his right to a decree. Had the payment of rent been unexplained, a different question would have arisen, but it appears, from the testimony, to have been a part of the contract, that one-third of the crops should go to the father during his life, and he was to pay the taxes, and at his death, the absolute title should vest in the son. The payment of rent, therefore, in this case, does not establish the relation of landlord and tenant between the parties and tend to prove that William Lucas was not occupying as a purchaser, but, on the other hand, the payment of rent was consistent with the contract under which William Lucas entered into possession of the land.”¹

393. PAYMENT OF TAXES.—The payment of taxes assessed against the land given is always a significant factor, of more or less weight according to the circumstances of each case. Thus where the taxes were assessed against the land in the name of the donor, the fact of the assessment in this way was deemed insignificant;² but the fact that the donee paid these taxes many years was considered to be “a fact of much significance bearing upon the character of his possession. The inference to be drawn from the fact is a strong one that all parties understood that the owners of the land should pay the taxes and bear the burdens charged upon it.”³

394. RELATIONSHIP OF DONOR AND DONEE.—Ties of blood existing between the donor and donee are not neces-

¹ *McDowell v. Lucas*, 97 Ill. 489; *Smith v. Yocum*, 110 Ill. 142; *Wertz v. Merritt*, 74 Ia. 683; *Wamsley v. Lincicum*, 68 Ia. 556; *Love v. Francis*, 63 Mich. 182.

² In fact in some States taxes in such an instance of a parol gift would always be so assessed until a deed to the donee, or some one else, was put on record.

³ *Fairfield v. Barbour*, 51 Mich. 57; *Davis v. Bowmar*, 55 Miss. 671.

sary to support the gift, although these are often potent factors in proving it.¹

395. GIFT BY A MARRIED WOMAN—INFANT.—A married woman cannot make a parol gift of her land even if her husband join therein. There is only one way in which she can divest herself of her land, and that is by deed in which her husband joins;² but after the sale of her lands she may make a gift, even to her husband, of the purchase-money.³ So a gift by a minor of his lands cannot be enforced, and his declarations to that effect are not admissible in evidence against him.⁴

396. DONEE MUST SHOW A DEFINITE PROMISE—MUST SHOW LAND GIVEN.—The donee, or those claiming under him, has the burden of showing not only a promise to convey, but a promise that is clear and certain in its terms.⁵ In another case from the same State it is said that “the contract should be established, by competent proof, to be clear, definite, and unequivocal in all its terms. If the terms are uncertain or ambiguous, or not made out by satisfactory proofs, a specific performance will not be decreed.”⁶ The terms and conditions of the contract “must be clear and free from all ambiguity and doubt.”⁷ “The gift must be definite in its terms and clearly proved. There must be no uncertainty or equivocation about it.”⁸

¹ *Porter v. Allen*, 54 Geo. 623; *Ackerman v. Fisher*, 57 Pa. St. 457.

² *Huffman v. Huffman*, 118 Pa. St. 58.

³ *McGinnis v. Curry*, 13 W. Va. 29.

⁴ *Harvey v. Carroll*, 72 Tex. 63.

⁵ *Langston v. Bates*, 84 Ill. 524; S. C. 25 Am. Rep. 466.

⁶ *Worth v. Worth*, 84 Ill. 442; *Stanton v. Miller*, 58 N. Y. 192.

⁷ *Murphy v. Stell*, 43 Tex. 123.

⁸ *Griggsby v. Osborn*, 82 Va. 371; *Halsey v. Peters*, 79 Va. 60.

397. **LAND GIVEN—BOUNDARIES.**—Where the gift is by deed, there is usually no difficulty in showing the exact land given ; but where it is by parol, there sometimes is, especially where it is a part of a tract owned by the donor. The rule is that the donee must show the subject of the gift, with reasonable certainty. It is not, however, necessary that lines of separation should be actually run upon the ground, if from the transaction, and the distinct subsequent possession of the donee, it is possible to ascertain the boundaries and quantity of the land given ; or, in other words, the proof must be such as to enable the jury or court to fix the locality and boundaries so as to direct where a surveyor may divide it off from the rest of the donor's land. If the tract given has well defined boundaries, even though adjoining the donor's own land, and is known by a certain name, then the gift of the tract by name, followed by possession, is sufficient. If it is a certain quantity out of a larger tract, then the possession of a tract equal in quantity to the amount given will determine the boundaries.¹ A failure to show the boundaries or limits of the lot will defeat the gift.² Even uncertainty in this respect will defeat it ;³ but they need not be fixed at the time of the gift, if, by act or word, the donor defines them afterward, such as erecting fences and the like. In the case of a gift to the public, however, courts will do their utmost to render the gift valid, going further than in the case of an individual.⁴

398. **SUFFICIENCY OF EVIDENCE TO ESTABLISH THE GIFT.**—The language of the courts is not the same in defining or declaring what will be sufficient evidence to

¹ *Burns v. Sutherland*, 7 Barr, 103 ; *Moore v. Small*, 19 Pa. St. 461.

² *Short v. M. E. Church*, 11 La. Ann. 174.

³ *Martin v. McCord*, 5 Watts, 493.

⁴ *McLain v. White Township*, 51 Pa. St. 196.

establish the gift of land by parol. Says the Maryland Supreme Court: "The proof must be clear, definite, and conclusive as to the fact of the gift, and those acts done on the faith of it which render inequitable any attempt by the donor to avoid the gift. But where the proof is thus clear, and all other conditions are shown to exist to entitle the party to the assistance of a court of equity, that court will not hesitate to lend its aid, simply because the proof may rest entirely in parol."¹ "A contract," says the Supreme Court of Illinois, "to convey should be clear and certain in its terms, and established by testimony of an undoubted character, which is clear, definite, and unequivocal."² "The party setting up such promise must be able to establish it by full, clear, and satisfactory evidence."³ In a Pennsylvania case it was said that "the rule is settled, that as between father and child the evidence of a gift or sale must be direct, positive, express, and unambiguous; that its terms must be clearly defined, and that all the acts necessary to its validity must have special reference to it, and nothing else."⁴ Where the contest is between father and son, or between the son and the heirs of the father, stronger evidence is required of the father's intention to part with the ownership of the property than is required in cases of parol contracts between strangers in blood.⁵ "There are obvious reasons for this distinction. The circumstances of families are subject to constant changes. The pecuniary relations between a father and his several children may shift not only from year to

¹ *Hardesty v. Richardson*, 44 Md. 617; S. C. 22 Am. Rep. 57; *Dawson v. McCaddin*, 22 Neb. 131.

² *Langston v. Bates*, 84 Ill. 524; S. C. 25 Am. Rep. 466; *Worth v. Worth*, 84 Ill. 442; *Woodbury v. Gardner*, 68 Me. 167.

³ *Murphy v. Stell*, 43 Tex. 123.

⁴ *Shellhammer v. Ashbaugh*, 83 Pa. St. 24; S. C. 34 Leg. Int. 67.

⁵ *Ackerman v. Fisher*, 57 Pa. St. 457.

year, but from month to month. The promise to give an estate to a child may have been founded on reasons involving anticipations never realized or plans never executed. Financial embarrassment, or increase in the number of the members of the family, the intervention of new duties, or the misconduct of the child may justify a change in the father's purpose."¹ "Nothing is more common," it is said in another case, "than that a father speaks of a farm on which he has placed his son to live, as the son's house. It is an every day's occurrence that a father speaks of having given a lot of ground to a son, when it was plain there was no intention to transfer the ownership. And such language is not confined to parol gifts. When a father says, I sold such a piece of real estate to my son, he generally means no more than that he agreed the son might have it for a consideration."² Probably such a strict rule does not always obtain a foothold. Thus it has been said that was only necessary to make out the transaction with "reasonable certainty."³ This was said, however, of a transaction partaking both of the nature of a contract and a gift; and a case of a contract purely was cited to support it.⁴ In New York it is said that the proof "should be very definite and certain to serve as a basis for that equitable relief or protection which dispenses with a writing and disregards the statute of frauds."⁵ In Georgia the following rule was announced, as the result of an examination of the cases:

¹ *Shellhammer v. Ashbaugh*, *supra*; *Printup v. Mitchell*, 17 Geo. 558.

² *Ackerman v. Fisher*, *supra*; *Ackerman v. Ackerman*, 24 N. J. Eq. 315; affirmed *Ib.* 585.

³ *Neale v. Neale*, 9 Wall. 1.

⁴ *Lester v. Foxcroft*, 1 Colle's P. C. 108; S. C. 2 Vern. nom. *Foxcraft v. Lister*, *Gilb. Rep.* 4; *Prec. Ch.* 516, 526, nom. *Leicester v. Foxcraft*, 1 L. C. Eq. 768; *Mondy v. Jolliffe*, 5 Myl. & Cr. 167, 177.

⁵ *Oggsbury v. Oggsbury*, 115 N. Y. 290; *Griggsby v. Osborn*, 82 Va. 371; *Halsey v. Peters*, 79 Va. 60.

"While it is not indispensable that the agreement should be established wholly by direct and positive evidence of its existence, and while it may be inferred from acts and conduct clearly referable to it, yet such acts must be of an unequivocal and unambiguous character, and must be established by testimony clear, definite, and unambiguous in its terms."¹ And the court, quoting from a previous case,² says that the agreement "should be made out so clearly, strongly, and satisfactorily as to leave no reasonable doubt as to the agreement."³

399. DONEE MUST SHOW THAT HE MADE IMPROVEMENTS OR EXPENDED LABOR THEREON.—The burden is upon the donee to show that he either made improvements upon the land given or performed labor thereon, to such an extent that it would be inequitable to not permit him to claim the land as his own.⁴ Not only must he show that he made improvements, but, where there is an agreement for a certain kind, he must show that he put such kind upon the land.⁵

400. DECLARATION OF THE DONOR TO PROVE OR DISPROVE GIFT.—The subject of declarations of the donor to prove or disprove a parol gift of land, or even a gift by deed or other instrument, has been treated at length elsewhere; but it is proper that something be said of this sub-

¹ *Beall v. Clark*, 71 Geo., p. 818; *Poullain v. Poullain*, 79 Geo., p. 11.

² *Printup v. Mitchell*, 17 Geo. 558.

³ See *Miller v. Cotten*, 5 Geo. 341; *Russell v. Switzer*, 63 Geo. 711. See *Truman v. Truman*, 79 Ia. 506. Gift of a mining claim, what is: see *Richardson v. McNulty*, 24 Cal. 339.

⁴ *Stewart v. Stewart*, 3 Watts, 253; *Bright v. Bright*, 41 Ill. 97; *Griggsby v. Osborn*, 82 Va. 371; *McDowell v. Lucas*, 97 Ill. 489.

⁵ *Ackerman v. Ackerman*, 24 N. J. 315; affirmed *Ib.* 585; *Frame v. Frame*, 32 W. Va. 463.

ject in this connection. The declarations of the donor of an intention to give the land at some future time, his declarations at the alleged time of the gift, and his subsequent declaration *in favor of it*, are all admissible to prove the gift. What was said at the time of the gift, which constitutes the *res gesta*, is admissible whether establishing or disproving the gift. But the declarations of the donor made after the time of the alleged gift are not admissible to disprove it. He cannot thus build up title in himself.¹ Nor can it be shown that the donor, after the gift, included the land in a list of his property as his own.² But declarations of ownership in the presence of the donee are admissible.³

401. ACTS AND CONDUCT OF DONOR AND DONEE.—The acts and conduct of the donor and donee are, with reference to the thing given, always the subjects of investigation, with the limitation that an act of the donor performed subsequent to the time of making the gift, in disparagement of the donee's title, not performed in the presence of the donee, may not be shown to defeat the gift. In fact, a parol gift of land may be inferred from acts of an unambiguous and unequivocal character.⁴ There are many cases supporting the general rule of this section.⁵ The character of the possession of the donee is always the subject of investigation, and the acts of the parties with reference to such possession necessarily after the gift is

¹ *Porter v. Allen*, 54 Geo. 623; *Hughes v. Hughes*, 72 Geo. 173; *Davis v. Bowmar*, 55 Miss. 671; *Warren v. Warren*, 105 Ill. 568, 572.

² *Duff v. Leary*, 146 Mass. 533.

³ *Hugus v. Walker*, 12 Pa. St. 173. Evidence of an old French custom of the early settlers of Detroit to give their farms to their eldest son is not admissible to establish such a gift in a particular case, where no direct evidence of a gift has been given: *Gilman v. Riopelle*, 18 Mich. 145.

⁴ *Poullain v. Poullain*, 76 Geo. 420; *Ferry v. Stephens*, 66 N. Y. 321.

⁵ *Warren v. Warren*, 105 Ill. 568; *Davis v. Bowmar*, 55 Miss. 671; *Jones v. Clark*, 59 Geo. 136; *Hughes v. Hughes*, 72 Geo. 173.

made are always admissible, with the limitation above stated. But the treatment at any time by the donor and donee, jointly, of the estate is always admissible; for it is in the nature of an admission by the donee or donor, as the case may be.

402. WHEN DONEE TAKES LAND WITHOUT THE INCUMBRANCE THEREON.—A donee of land incumbered takes it without the incumbrance thereon; and if he pays the incumbrance he can recover the amount paid from the donor or his estate. Thus where a father promised his daughter to give her an estate upon her marriage, and afterward he did so, giving her an incumbered estate, which incumbrance she was compelled to pay off, it was held that she was entitled to file a claim against her father's estate for the amount paid with interest.¹ But, of course, the donor may, by express words or the like, give the land subject to the incumbrance; or make it a condition of the gift that the donee procure its discharge.

403. WHEN DONEE ACQUIRES A TITLE TO THE LAND GIVEN—JUDGMENT LIEN.—It is a question of some importance to ascertain just when the donee acquires a title to the land given, or when the title becomes vested in him. Until a gift is completed the title remains in the donor; and a judgment against him is a lien on the land. The gift is completed, however, the earliest moment at which the donee can compel the donor to give him a deed for the property. Thus where the gift was made (by parol) in 1865, a judgment taken against the donor in 1867, and the land levied upon, under this judgment, and sold

¹ *Ungley v. Ungley*, 4 Ch. Div. 73; S. C. 46 L. J. Ch. 189; 25 W. R. 39; 35 L. T. N. S. 619; 19 Moak. 678; affirmed 5 Ch. Div. 887; S. C. 46 L. J. Ch. 854; 25 W. R. 733; 37 L. T. N. S. 52.

in 1873, the sale was held valid.¹ But if the title has passed, a judgment taken thereafter is not a lien on the land; nor has the administrator of the deceased donor, or his widow for her support, any interest in the land.² So a judgment against the donee is no lien on the land until he has acquired title to it.³

404. RIGHTS OF CREDITORS OF DONEE.—No one is authorized to give a donee credit upon the mere fact of the latter being in possession of the land claimed to have been the subject of the gift. He must act at his peril. But if he go to the alleged donor before advancing anything of value upon the faith of the donee's possession and is informed, upon inquiry, by the donor that the property is that of the donee, then he may rely upon such statement and fully credit the donee; for the donor, as against such person and those claiming under him, will be estopped to deny the donee's title.⁴

405. KIND OF ACTION—EJECTMENT—TRESPASSES—TRIAL BY JURY.—Many of the cases touching the validity of a parol gift of land have been cases brought to enforce a specific performance of the contract of gift by the donee against the donor or his heirs. This, of course, is in a court of equity. In many other instances the donor brought an action of ejectment, and under the codes the donee was allowed to defend the same as if he had the legal title; while in others there was an application for a stay of proceedings until a court of equity could be appealed to for relief; and still in others a bill for a specific performance was allowed, under the code, as an answer or

¹ *Jones v. Clark*, 59 Geo. 136; *Hughes v. Berrien*, 70 Geo. 273; *Johnson v. Griffin*, 80 Geo. 551.

² *Hughes v. Hughes*, 72 Geo. 173.

³ *Harvey v. West*, 87 Geo. 553.

⁴ *Hugus v. Walker*, 12 Pa. St. 173.

cross-bill to the declaration or complaint.¹ The practitioner will have no trouble in determining the relief to seek in his own particular State. A donee in possession, however, even in a State where he can acquire no title as against the donor, may maintain ejectment against a stranger or an action for damages against any one (excepting the donor where he acquires no title as against him) who commits waste or damages the land given.² The jury, on such trial, are to determine whether the facts, proved sufficiently, establish a gift.³

406. COMPENSATION IN DAMAGES.—Where the position of the donee is such that he can be adequately compensated in damages, the donor may reclaim possession of the land, and a bill for specific performance will not lie in behalf of the donee.⁴ But upon this point there is such a wide discussion in the reports that we cannot afford to enter upon the question, especially as it lies beyond the plan of this work. We cannot refrain, however, from making a quotation from a Georgia case, viz.: “All the courts require is proof of the agreement, and that it has been so far partly executed as to let the purchaser into the possession under it, and that he has made valuable improvements on the land, and a performance will be decreed. To allow parties, in avoidance of this rule, to go farther and inquire whether injury has in fact resulted, or whether the corresponding benefits already received have not fully compensated for the change of possession and improvements, in order to bring the case back within the operation of the statute, would be to inaugurate an

¹ *Howell v. Ellsberry*, 79 Geo. 475.

² *Trammell v. Simmons*, 17 Ala. 411; *Badger v. Lyon*, 7 Ala. 564; *Conn v. Prewitt*, 48 Ala. 636.

³ *Burns v. Sutherland*, 7 Barr, 103; *Moore v. Small*, 19 Pa. St. 461.

⁴ *Moore v. Small*, 19 Pa. St. 461.

entirely new rule on this subject and add greatly to the complication of this already embarrassing question, and would be wholly changing the rights of the parties under the agreement. Such an inquiry would always arise in those cases where a bare possession is relied upon to take the case out of the statute; and that has always been held to be sufficient for that purpose, yet the inquiry never has been gone into, or if so, has universally been disallowed by the courts. The question of compensation in lieu of specific performance has been considered, and while the court of equity has regretted, when it was practicable, that it had not been adopted, rather than that of specific performance,¹ yet the rule was too well settled to admit of it, except only in those cases where payments of the purchase-money was relied on as part performance; and I take it, that the reason of that is that when the thing done is the payment of money, that can always be measured, and its exact equivalent returned, and when the possession is changed or improvements made, the value of these things must always be matters of opinion merely, and cannot be measured or exactly ascertained so as to certainly put the party making them in the same condition he was." "There is another reason that occurs to me as entitled to much consideration, in opposition to the principle insisted upon here, though I have not seen it in the books—that is, when a party has placed himself in a position to ask specific performance, either by possession or improvement, the thing—that is, the land—is his, or at least he is entitled to a conveyance, to a specific performance, at that time, and the rents, profits, issues or benefits accruing to him from its use and occupation from that time are his, and not that of the vendor or donor; and when he is

¹ Citing *Forster v. Hale*, 3 Vesey, 696.

asked or required to appropriate these things or benefits in compensation for his labor, improvements, or expenses, he is asked or required to compensate himself with that which is his own, and for which he is supposed to have entered into the agreement.”¹

407. DONEE ENTITLED TO RECOVER FOR IMPROVEMENTS.—Where the donee cannot acquire title under a parol gift, he is entitled to recover the value of the improvements he puts upon the land. The rule has been stated thus, referring to a particular instance: “But as the son had taken possession of the land under the verbal gift, and made valuable improvements thereon, under the expectation created by the act of the father, that the gift would be consummated, he is in equity entitled to pay for those improvements, and has a lien upon the land to secure the payment of their value. This lien would exist against the donor, and is valid against creditors. But its amount must be determined by deducting from the value of the improvements a reasonable compensation for the use of the land.”² So if the gift for some reason was incomplete, but the donee, relying upon the assurance of the donor and thereby having been misled, puts on valuable improvements, he will be entitled to recover their value and have the amount thereof declared a lien upon the land, with the exceptions above noted.

¹ *Mims v. Lockett*, 33 Geo. 9; *Warren v. Warren*, 105 Ill. 568; *Waterman on Sp. Perf.*, sects. 14, 15.

² *Rucker v. Abell*, 8 B. Mon. 566; *Duckett v. Duckett*, 71 Md. 357; *Ridley v. McNairy*, 2 Humph. 174; *Humphreys v. Holtsinger*, 3 Sneed, 228; *Ewing v. Handley*, 4 Litt., p. 346.

CHAPTER XV.

VOLUNTARY TRUSTS.

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408. INTRODUCTION.—The subject of voluntary trusts is one not unfree of difficulties, owing to the many conflicting cases. Upon the general principles applicable to

this kind of trusts, there is but little conflict; but it is upon their application to particular facts or transactions where the conflict arises. The subject, however, naturally divides itself into two branches: *First*. Where a donor has conveyed, or attempted to convey or give property to a trustee for the benefit of a designated donee; *Second*. Where the donor has, by some act or instrument in writing, constituted himself a trustee for the beneficiary or donee.¹

409. GIFT FAILING FOR LACK OF CONVEYANCE IS INVALID AS A DECLARATION OF TRUST.—One rule is of universal application, however, to questions of this kind; and that is that if the transaction is insufficient to create a trust in a designated person as trustee for the donee, it cannot be upheld as a true gift (by regarding the transaction as sufficient to hold the donor as a trustee). Thus if A undertakes to create a trust by delivering the property to B as trustee for C, and the transaction fail for lack of a sufficient delivery, the transaction cannot be upheld as a trust by regarding A as having constituted himself as a trustee for C. To do so would be to uphold a gift where there was no sufficient delivery, and thus to override one of the cardinal rules of gifts. Said Lord Justice Turner: "The cases, I think, go further, to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust."²

¹ Richards v. Delbridge, 18 L. R. Eq. 11; S. C. 43 L. J. Ch. 459; 22 W. R. 584.

² Milroy v. Lord, 4 D. F. & J. 264, 274; S. C. 7 L. T. N. S. 178; Richards v.

410. IMPERFECT GIFT CANNOT BE CONSTRUED A TRUST.

—If a transaction shows that the donor intended to make a gift, but by reason of some essential step it fails, the transaction cannot then be construed as creating a trust. A court of equity cannot convert an imperfect gift into a declaration of trust, merely on account of the imperfection.¹ “The making a man trustee involves an intention to become a trustee, whereas words of gift show an intention to give over property to another, and not to retain it in the donor’s hands for any purpose, fiduciary or otherwise.”²

411. NOT TO BE CONFOUNDED WITH CONVEYANCES FOR A VALUABLE CONSIDERATION.—A conveyance, as a gift, to a trustee for a designated third person should not be confounded with a conveyance to a trustee for a valuable consideration; nor with another class of cases in which words of transfer for a valuable consideration are held to be evidence of a contract which the courts will enforce.³

412. TRUST MUST BE COMPLETED BY DONOR.—If A transfers property to B in trust for C, the latter may enforce the trust against both of them. No consideration is necessary. But in order to enable the beneficiary to enforce the trust, it must be completely executed. A conveyance by written instrument, however, is not necessary, for the trust may be proved by parol or even by acts of the donor. “The one thing necessary,” said Vice-

Delbridge, 18 L. R. Eq. 11; S. C. 43 L. J. Ch. 459; 22 W. R. 584; *Marcy v. Amazeen*, 61 N. H. 131, 134.

¹ *Heartley v. Nicholson*, 44 L. J. Ch. App. 277.

² *Richards v. Delbridge*, 18 L. R. Eq. 11; S. C. 43 L. J. Ch. 459; 22 W. R. 584; *Young v. Young*, 80 N. Y. 422. If the trust is created by a writing, parol evidence of the donor’s declarations is not admissible to contradict it: *Lee v. Luther*, 3 Wood & M. 519; *Barnum v. Reed*, 136 Ill. 388.

³ *Richards v. Delbridge*, 18 L. R. Eq. 11; S. C. 43 L. J. Ch. 459; 22 W. R. 584.

Chancellor Bacon, "to give validity to a declaration of trust—the indispensable thing—I take to be, that the donor, or grantor, or whatever he may be called, should have absolutely parted with that interest which had been his up to the time of the declaration, should have effectually changed his right in that respect, and put the property out of his power in the way of interest."¹ Lord Eldon at an early day laid down one of the cardinal rules of voluntary trusts touching their validity and enforcements in courts of equity. "I take the distinction to be," said he, "that if you want the assistance of the court to constitute you *cestui que trust*, and the instrument is voluntary, you shall not have that assistance, for the purpose of constituting you *cestui que trust*. As upon a covenant to transfer stock, if it rest in covenant and is purely voluntary, this court will not execute that voluntary covenant; but if the party has completely transferred stock, though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by this court."² Many cases contain statements in which language similar to this is used. Thus Chief Justice Bigelow has well said: "The key to the solution of the question raised in this case is to be found in the equitable principle now well established and uniformly acted on by courts of chancery, that a voluntary gift or conveyance of property in trust, when fully completed and executed, will be regarded as valid, and its provisions enforced against all persons except creditors and *bona fide* purchasers without notice. It is certainly true that a court of equity will lend no assistance toward perfecting a voluntary contract or agreement for the creation of a trust, nor regard it as binding so long as

¹ Warriner v. Rogers, L. R. 16 Eq. 340; S. C. 42 L. J. Ch. 581; 21 W. R. 766; 28 L. T. N. S. 863.

² Ellison v. Ellison, 6 Ves. Jr. 656; Bridge v. Bridge, 16 Beav. 315; S. C. 16 Jur. 1031.

it remains executory. But it is equally true that if such agreement or contract be executed by a conveyance in trust, so that nothing remains to be done by the grantor or donor to complete the transfer of the title, the relation of trustee and *cestui que trust* is deemed to be established, and the equitable rights and interests arising out of the conveyance, though made without consideration, will be enforced in chancery.”¹

413. DONOR CONSTITUTING HIMSELF A TRUSTEE FOR THE DONEE.—The owner of property may by a deed or other instrument in writing, or even by a parol declaration or by acts and conduct, raise a trust in favor of a donee, and constitute himself a trustee for him, without any actual delivery to the donee of the thing given. In all such instances the declaration of trust must be clear and explicit, and must be fully executed, not merely resting in promise, but completed. Usually questions concerning such trusts have arisen where the donor has constituted or attempted to constitute himself a trustee by a deed or other written instrument; but the same rule is applicable where the declaration of trust has been by parol, or by acts of the donor, or by both combined. Whenever such a trust has been raised, whether the property is capable or incapable of delivery or transfer, the donee may enforce the trust against the donor, who from thenceforward is a mere trustee. “The legal owner of the property may,” said Jessel, Master of the Rolls, “by one or other of the modes recognized as amounting to a

¹ *Stone v. Hackett*, 12 Gray, 227; *Ex parte Pye*, 18 Ves. 140; *Pulvertoft v. Pulvertoft*, 18 Ves. 84; *Colman v. Sarrel*, 1 Ves. 50; S. C. 3 Bro. C. C. 12; *Graham v. Graham*, 1 Ves. 272; *Knye v. Moore*, 1 Sim. & Stu. 61; *Cotteen v. Missing*, 1 Madd. 176; *Thorpe v. Owen*, 5 Beav. 224; *Wilcocks v. Hannington*, 5 Ir. Ch. 38; *Martin v. Funk*, 75 N. Y. 134; *Robson v. Robson*, 3 Del. Ch. 51, a very excellent discussion of many points; *Flanders v. Blandy*, 45 Ohio St. 108; *Minor v. Rogers*, 40 Conn. 512.

valid declaration of trust, constitute himself a trustee, and, without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person. It is true he need not use the words, 'I declare myself a trustee,' but he must do something which is equivalent to it, and use expressions which have that meaning; for, however anxious the court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning."¹ Lord Justice Turner, speaking in another case on the same subject, said: "I take the law of this court to be well settled, that, in order to render a voluntary settlement valid and effectual the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may, of course, do this by actually transferring the property to the persons for whom he intends to provide, and the provision will be effectual; and it will be equally effectual if he transfers the property to a trustee for the purposes of a settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal the trust may, I apprehend, be declared either in writing or by parol; but in order to render the settlement binding one or other of these modes must, as I understand the law of this court, be resorted to, for there is no equity in this court to perfect an imperfect gift."²

¹ *Richards v. Delbridge*, 18 L. R. Eq. 11; S. C. 43 L. J. Ch. 459; 22 W. R. 584.

² *Milroy v. Lord*, 4 D., F. & J. 264, 274; S. C. 7 L. T. N. S. 178; 8 Jur. N. S. 806; 31 L. J. Ch. 798. "Nothing can be more clear and distinct," said V. C. Bacon, referring to the quotation just made above, "than the exposition of the law contained in the sentences I have read, and to my judgment nothing more satisfactory, if I were at liberty (which I am not) to pronounce a critical opinion

Thus a testatrix gave her personal estate to B for the benefit of B's daughter. B invested the proceeds of the estate, together with £1,000 of his own money, in his own

of it." *Warriner v. Rogers*, 16 L. R. Eq. 340; S. C. 42 L. J. Ch. 581; 28 L. T. 863; 21 W. R. 766. In the case of *Richards v. Delbridge*, 18 L. R. Eq. 11; S. C. 43 L. J. Ch. 459; 22 W. R. 584, *Jessel, M. R.*, says that the cases of *Richardson v. Richardson*, 3 L. R. Eq. 686; S. C. 36 L. J. Ch. 653, and *Morgan v. Malleson*, 10 L. R. Eq. 475; S. C. 39 L. J. Ch. 680; 23 L. T. N. S. 336; 18 W. R. 1125, are overruled by *Milroy v. Lord*, *supra*. *Kekewick v. Manning*, 1 De G., M. & G. 176; S. C. 21 L. J. Ch. N. S. Ch. 577; 16 Jur. 625, is a leading case on this subject. There a person, beneficially entitled to stock standing in his name, deliberately and advisedly executed a deed, declaring himself a trustee for certain purposes to take effect at once, and communicated and delivered the deed to the *cestui que trust*. The court enforced the trust against its author: *In re Bennett*, 17 L. T. N. S. 438. The lessee of a large farm, who had considerably increased its value by the expenditure of money, failed and assigned the lease to trustees, who in turn assigned it to the landlord. His wife's brother then applied to the landlord to become tenant of the remainder of the lease upon the same terms, stating in his written application that it was "with the view to benefit his sister and her unfortunate family." With that view the landlord granted the lease; and the brother, contrary to the landlord's usual habit, was allowed to have a co-lessee, who was the actual occupier, and also to sub-let a part, by which means he, the brother, derived a clear £100 a year above the rent, which was paid by the co-lessee. It was held that, by means of these letters and the circumstances, the court would enforce a trust as to the £100 a year for the wife of the original tenant and her children as joint tenants: *Morton v. Tewart*, 2 Y. & Coll. N. C. 67. A and B, partners, were indebted to C and D. By letter A proposed to assign a claim which he and B had upon the estate of P, then the subject of a suit in chancery. Certain properties of this estate were sold and A purchased them for C and D, as he declared by letters. It was held that there was a clear trust established, even as against A's subsequent assignee in bankruptcy: *Johnson v. Perrin, Hayes*, 322. A memorandum of a gift was in this form: "I hereby give and make over to M. an Indian bond, value £1,000." It was signed and given by the donor to one M., without handing over the bond. The donor died, but as against his residuary legatee the gift was upheld as a good declaration of trust in favor of M.: *Morgan v. Malleson*, 10 L. R. Eq. 475; S. C. 39 L. J. Ch. 680; 23 L. T. N. S. 336; 18 W. R. 1125; *Boyd's Case*, 1 De G. & J. 223; 3 Jur. N. S. 897; 26 L. J. Ch. 737. In *Scales v. Maude*, 6 De G., M. & G. 43; S. C. 1 Jur. N. S. 1147; 25 L. J. Ch. 433; 3 W. R. 527; 1 Jur. N. S. 533, it was held that a mere declaration of trust was not enforceable unless there had been a change of legal ownership and so a trust constituted; but in *Jones v. Lock*, 1 L. R. Ch. 25; S. C. 35 L. J. Ch. 117; 13 L. T. N. S. 514; 11 Jur. N. S. 913; 14 W. R. 149, this declaration, a mere *dictum*, was overruled. Certain lands were vested in trustees for B, a married woman, during her coverture, with directions to pay the rents as she should by writing direct; and after termination of coverture she was to have the

name, and afterward treated and admitted the aggregate fund as held in trust for his daughter. On the death of B the fund was found mixed with his own funds. The court decided that under the circumstances there was a trust of £1,000 in favor of the daughter.¹ A father gave his daughter \$400 toward the purchase of a tract of land, made by her husband, intending that the loan should go into the land for her benefit. Afterward, hearing that her husband had taken the title in his own name, he took from him a note for the amount given. By articles of agreement the husband sold the land, and the father, still holding the note, took judgment on it, and levied upon and purchased the land. By ejectment against the equitable vendee he obtained possession, and collected from him the unpaid purchase-money, amounting to, less expenses, \$600. It was held that the father, when

legal estate in the lands. During her coverture she wrote to C: "You hold a bond [giving the date and amount], signed by my husband and myself. I hold myself accountable for the payment of this bond, with interest at six per cent., against the lands of D [which were held in trust for her]; and should he die, or should I die, my son John, whom I have made my heir, shall hold himself accountable for the amount of this bond, and cause you to be paid, retaining you, or, in the event of your death, your son James, as agent for the lands of D, until said bond is discharged." This was duly signed. The bond alluded to in the letter, though signed by her, was in the body of it only the bond of her husband. It was held that this was binding on the lands as a trust, though not on her personally: *Wilcocks v. Harnnyngton*, 5 Ir. Ch. 38. Generally, *Ownes v. Ownes*, 23 N. J. Eq. 60; *Crawford's Appeal*, 61 Pa. St. 52. "To constitute himself the trustee of property remaining in his possession and not transferred at law, it must appear from his acts or declarations that he intended to part with his former ownership of the thing, and to retain only the legal title and control which belongs to a trustee, precisely such as would pass to a third person taking as a trustee in the first instance:" *Robson v. Robson*, 3 Del. Ch. 51, 78. If property passes into the hands of a donee, charged with a trust, and he promises the beneficiary to perform the trust, performance of such promise may be compelled by an action at law; and, if no such promise was made, by a suit in equity: *Trorlicht v. Weizen-ecker*, 1 Mo. App. 482; *Minor v. Rogers*, 40 Conn. 512; *Love v. Francis*, 63 Mich. 181; *Southerland v. Southerland*, 5 Bush. 591; *Lamprey v. Lamprey*, 29 Minn. 151; *Gannon v. White*, 2 Ir. Eq. 207.

¹*Thorpe v. Owen*, 5 Beav. 224.

he purchased the land at sheriff's sale, became a trustee for her.¹

414. SUFFICIENCY OF LANGUAGE TO CREATE A TRUST.—It is not necessary that the donor should in express words declare that he creates a trust, as "I declare myself a trustee,"² nor to use the words "confidence," "trust," or "trustee."³ But language showing a gift absolute cannot be turned into a sufficient declaration of trust,⁴ nor can language showing only a mere intention to create a trust.⁵

415. DONOR MUST PART ABSOLUTELY WITH HIS INTEREST IN THE PROPERTY.—The declaration of trust and the acts of the donor must be sufficient to absolutely divest him of all title in and to the property given or which is the subject of the trust. His acts and declarations must effectually put all his interest beyond his control.⁶ If any further act remains to be performed to render the gift or

¹ *Sourwine v. Claypool*, 138 Pa. St. 126.

² *Richards v. Delbridge*, 18 L. R. Eq. 11; S. C. 43 L. J. Ch. 459; 22 W. R. 584.

³ *Kekewick v. Manning*, 1 De G., M. & J. 176; S. C. 21 L. J. Ch. N. S. 577; 16 Jur. 625; *Ex parte Pye*, 18 Ves. 140; *Ellis v. Secor*, 31 Mich. 185.

⁴ *Young v. Young*, 80 N. Y. 422.

⁵ *In re Glover*, 2 John. & Hem. 186. The following unsigned entry in a ledger was held not to constitute a gift: "N. B.—As I gave R. J. Adams only, say, about £2,000 when he commenced business in partnership with E. J. Bristowe (£2,000 being his own money as received for sale of farm, etc.), I am due to him, to make him equal to what I gave James Adams, the sum of £3,000. Therefore I credit R. J. Adams' interest on this, at five per cent. annually, £150." But see *Smith's Estate*, 8 Pa. C. C. 539; *Adams v. Lopdell*, 25 L. R. Ir. 311. "To constitute a trust there must be either an explicit declaration of trust, or circumstances which show beyond reasonable doubt that a trust was intended to be created:" *Beaver v. Beaver*, 117 N. Y. 421.

⁶ *Collinson v. Patrick*, 2 Keen, 123; S. C. 7 L. J. N. S. Ch. 83; *Peckham v. Taylor*, 6 L. T. N. S. 487; *Bentley v. Mackay*, 15 Beav. 12; *Milroy v. Lord*, 8 Jur. N. S. 806; S. C. 31 L. J. Ch. 798; 7 L. T. N. S. 178; 4 De G., F. & J. 264; *Wilkinson v. Wilkinson*, 4 Jur. N. S. 47; *Walrond v. Walrond*, 4 Jur. N. S. 1099; *Scales v. Maude*, 3 W. R. 527; S. C. 1 Jur. N. S. 533; 6 De G., M. & G. 43; 1 Jur. N. S. 1147; 25 L. J. Ch. 433.

settlement complete the courts will not compel its completion, however strong the intent, of the donor to make the gift complete may have been manifested and remain unretracted.¹

416. DONOR MUST PART WITH HIS DOMINION OVER GIFT—ASSISTANCE OF A COURT OF EQUITY.—The donor cannot retain any dominion over the gift as the owner and create a perfect trust. In this respect it is precisely as in the case of an ordinary gift exclusive of any question of trust. No part of the legal dominion can remain in him as an individual, though it may, as we have seen,² as trustee.³ A court of equity will not compel him to complete the gift.⁴ Thus where a donor assigned a mortgage, and purported to convey copyholds; and he also covenanted for quiet enjoyment and for further assurance; but died without having surrendered the copyholds; the court refused to render assistance to compel the completion of the voluntary settlement.⁵ But if the donor has divested himself of all title to the article given, and of all control over it, courts of equity will enforce the trust thus voluntarily created.⁶

¹ *Dening v. Ware*, 22 Beav. 184; *Warriner v. Rogers*, 16 L. R. Eq. 340; S. C. 42 L. J. Ch. 581; 21 W. R. 766; 28 L. T. N. S. 863; *Heartley v. Nicholson*, 19 L. R. Eq. 233; 44 L. J. Ch. 277; 21 L. T. N. S. 822.

² See Section 413.

³ *Hughes v. Stubbs*, 1 Hare, 476; 6 Jur. 831; *Ex parte Pye*, 18 Ves. 140; *Warriner v. Rogers*, 16 L. R. Eq. 340; 42 L. J. Ch. 581; 21 W. R. 766; 28 L. T. N. S. 863; *Wilkinson v. Wilkinson*, 4 Jur. N. S. 47; *Searle v. Law*, 15 Sim. 95.

⁴ *Wittingham v. Lighthipe*, 46 N. J. Eq. 429.

⁵ *Dening v. Ware*, 22 Beav. 184.

⁶ *Stone v. Hackett*, 12 Gray, 227; *Andrews v. Hobson*, 23 Ala. 219; *Bunn v. Winthrop*, 1 Johns. Ch. 329; *Tolar v. Tolar*, 1 Dev. (N. C.) 456; *Hardin v. Baird*, 6 Litt. 340; *Fogg v. Middleton*, Riley Ch. 193; *Greenfield's Est.*, 2 Harr. (Pa.) 489; *Kirkpatrick v. McDonald*, 1 Jour. 387; *Graham v. Lambert*, 5 Humph. 595; *Henson v. Kinard*, 3 Strobb. (S. C.) Eq. 371; *Dupre v. Thompson*, 4 Barb. 279; *Cox v. Sprigg*, 6 Md. 274; *Lane v. Ewing*, 31 Mo. 75; *Massey v. Huntington*, 118 Ill. 80; *Howard v. Savings Bank*, 40 Vt. 597; *Tanner v. Skinner*, 11

417. MERE INTENT TO CREATE A TRUST IS NOT SUFFICIENT.—A mere intention on the part of the donor to create a trust in favor of the donee is not sufficient ; so if his declarations and acts show that he intended to do something farther to complete the gift, there is no trust created. An illustration of this is where a mother expressed her intention to make a settlement of a part of property she held under a will upon her daughter, requesting her solicitor to prepare such a settlement ; and when he prepared and brought it to her she refused to sign it, saying she had changed her mind, the court refused to enforce the trust against her, for the reason that her declaration amounted only to the expression of an intent and was not considered by her as a finality in the transaction.¹

418. TRUST MUST BE CERTAIN AND NOT REST IN INTENTION OR PROMISE—MERE INTENT.—In order to raise a trust the intention of the donor must be clearly expressed in whatever manner he undertakes to create it. It must not rest in conjecture either as to the thing or amount given or the object of the gift or the time when it is to be created. Thus a donor wrote to her executor : “ As to the money to be allowed C. M., when you ascertain what the property is, whatever you and Mr. M. think right that I should give her, I shall abide by.” It was considered that the gift was inchoate, “ the *quantum* of property not having been ascertained.” Later the same donor wrote : “ With respect to C. M., as you and Mr. M.

Bush, 120 ; Padfield v. Padfield, 68 Ill. 210 ; Lee v. Luther, 3 Wood. & M. 519 ; Robson v. Robson, 3 Del. Ch. 51.

¹ Bayley v. Boulcott, 4 Russ. 345. Where the character of the instrument of gift, upon inspection, is left doubtful, parol evidence is admissible to show the intention of the maker : Egerton v. Carr, 94 N. C. 648 ; Martin v. Funk, 75 N. Y. 134 ; Jackson v. Twenty-third St. Ry. Co., 88 N. Y. 520 ; Chappell v. Griffith, 53 L. T. 459 ; S. C. 50 J. P. 86 ; McMahon v McMahon, 55 L. T. 763.

says she ought to be allowed £500, I will readily consent to it. I am willing to do anything that is right." "This letter," said the court, "amounted to a declaration of the propriety of giving her £500, and shows her approval of a gift to that amount; but does not give effect to the gift, and carry it into execution. Nothing is said as to who is to pay the money, or when it is to be paid. . . . Nothing is said as to what part of her property this money was to be raised out of; whether out of money in the funds, or out of the estate. Nothing is to be found in the letters but an intention to give; and therefore this case widely differs from the cases alluded to, where acts were done, carrying the gift into execution. Here the gift was not executed." ¹ So where a father took his own check for £900 and placed it in his baby-boy's hands, saying in the presence of his wife and the nurse, "I give this to baby; it is for himself, and I am going to put it away for him," and then took the check, saying again he was going to put it away for him; and about the same time told his solicitor that he intended to add £100 to the £900, and invest it for the benefit of his son; but died before doing so, it was held that there was no gift, the check not operating as a transfer of the funds it represented, and the declarations, in view of this fact, operating only as evidence of an intent to make the gift. ²

¹ *Cotteen v. Missing*, 1 Madd. 176; *King's Estate*, 21 L. R. Ir. 273.

² *Jones v. Lock*, 1 L. R. Ch. 25; S. C. 35 L. J. Ch. 117; 13 L. T. N. S. 514; 11 Jur. N. S. 913; 14 W. R. 149; *Scales v. Maude*, 6 De G. & M. 43; S. C. 1 Jur. 533, 1147; 25 L. J. Ch. 433; 3 W. R. 527; *Wilkinson v. Wilkinson*, 4 Jur. N. S. 47; *Pownall v. Anderson*, 4 W. R. 407. That courts will not establish a trust on the voluntary agreement of the settler, made without consideration, when at the time the settler contemplated some further act for the purpose of making it complete, see *Swan v. Frick*, 34 Md. 139; *Lloyd v. Brooks*, 34 Md. 27; *Bayley v. Boulcott*, 4 Russ. 345; *Dipple v. Corles*, 11 Hare, 183; *Caldwell v. Williams*, 1 Bail. Eq. 175; *Crompton v. Vasser*, 19 Ala. 259; *Reed v. Vannorsdale*, 2 Leigh. 569; *Hayes v. Kershow*, 1 Sandf. Ch. 258; *Evans v. Battle*, 19 Ala. 398; *Minturn v. Seymour*, 4 Johns. Ch. 497; *Acker v. Phoenix*, 4 Paige, 305; *Dawson v. Daw-*

419. DONOR MUST HAVE INTENDED TO CREATE A TRUST.—The donor must have intended to create the trust and place it beyond his control as owner. If from the whole transaction it appears that he had no such intention, then his declarations of a gift in trust, however formal, will be unavailing to create a trust.¹

420. DIFFERENCE BETWEEN AN ASSIGNMENT AND A DECLARATION OF TRUST.—The distinction between an assignment for a volunteer and a declaration of trust in his favor is very thin. Thus if the owner of a fund says "I hold this fund for A," the trust is complete; but if he only assigns it, a different relation exists between the parties; and it would be a destruction of the distinction to say that an assignment, because it may create a trust, is to be considered the same as a declaration of trust. Therefore, in England, where stock could only be transferred by an entry on the books of the corporation, a mere assignment of it without an actual transfer was held not to create a trust in favor of the assignee.²

son, 1 Dev. (N. C.) Eq. 93; *Yarborough v. West*, 10 Geo. 471; *Read v. Robinson*, 6 W. & S. 329; *Clarke v. Lott*, 11 Ill. 105; *Shaw v. Burney*, 1 Ired. (N. C.) Eq. 148; *Lanterman v. Abernathy*, 47 Ill. 437; *Gardner v. Merritt*, 32 Md. 78; *Lowry v. McGee*, 3 Head. 269; *Forward v. Arnstead*, 12 Ala. 124; *Tiernan v. Poor*, 1 Gill. & J. 216; *Darlington v. McCoole*, 1 Leigh, 36; *Bibb v. Smith*, 1 Dana, 580; *Banks v. May*, 3 A. K. Marsh, 435; *Penfold v. Mould*, 4 L. R. Eq. 562; *Antrobus v. Smith*, 12 Ves. 39; *Colman v. Sarel*, 3 Bro. Ch. 12. When the character of the instrument of gift, upon inspection, is left doubtful, parol evidence is admissible to show the intention of the maker: *Egerton v. Carr*, 94 N. C. 648; *Martin v. Funk*, 75 N. Y. 134; *Robson v. Robson*, 3 Del. Ch. 50; *Flanders v. Blandy*, 45 Ohio St. 108, a gift of bonds.

¹ *Robson v. Robson*, 3 Del. Ch. 51, 78; *Hughes v. Stubbs*, 11 Jur. N. S. 992; *Heartley v. Nicholson*, 19 L. R. Eq. 233; 44 L. J. Ch. 277; 22 L. T. N. S. 822; *Chappell v. Griffith*, 53 L. T. 459; S. C. 50 J. P. 86.

² *Beech v. Keep*, 18 Beav. 285; S. C. 18 Jur. 971; 23 L. J. Ch. 539; 2 W. R. 316; *Bridge v. Bridge*, 16 Beav. 315; *Robson v. Robson*, 3 Del. Ch. 51; *Trough's Estate*, 75 Pa. St. 115; *Pethybridge v. Burrow*, 53 L. T. 5; *West v. West*, 9 L. R. Irish, 121; *Moore v. Moore*, 18 L. R. Eq. 474; S. C. 43 L. J. Ch. 617; 22 W. R. 729; 30 L. T. 752; *Ellis v. Secor*, 31 Mich. 185.

421. WHEN TRUST IS COMPLETED.—A trust may be said to be completed when the donor has no farther act to perform to render it effectual. In the case of a deed creating a trust, the execution of the deed—or the signing and delivery of the deed—is a completion of the trust.¹ It is a question of fact whether the trust has been perfected; and in determining that question, the situation and relation of the parties, the kind of property, and the object the donor had in view in creating the trust must all be considered.²

422. PAROL DECLARATION ACCOMPANIED BY ACTS.—Nearly all the cases concede that the donor may constitute himself a trustee by a parol declaration to that effect. In such instances, however, the declaration must be very clear and explicit; but if the declarations are accompanied or followed (and perhaps preceded) by acts in harmony with them, the courts will much more readily uphold the trust and decree its execution. Thus where a testator bequeathed £2,000 on a certain trust, empowering his executor, who was also his residuary legatee, to retain the amount in his hands uninvested, he paying interest thereon; and the executor being satisfied that the testator intended to bequeath £3,000 instead of £2,000, promised to make it £3,000 but made no investment, continuing, however, to pay interest on the £3,000; the court considered that there was a completed gift, and enforced it.³

¹ *Massey v. Huntington*, 118 Ill. 80; *Evans v. Grey*, 9 L. R. Ir. 539.

² *Jones v. Lock*, 1 L. R. Ch. 25; 35 L. J. Ch. 117; 13 L. T. N. S. 514; 11 Jur. N. S. 913; 14 W. R. 149; *Brabook v. Boston Five Cents Savings Bank*, 104 Mass. 228; *Hackney v. Vrooman*, 62 Barb. 650; *Martin v. Funk*, 75 N. Y. 134; *Taylor v. Henry*, 48 Md. 550; S. C. 30 Am. Rep. 486; *Blaisdell v. Lock*, 52 N. H. 238; *In re O'Brien*, 11 R. I. 419; *Stone v. Bishop*, 4 Cliff. 593; *Egerton v. Carr*, 94 N. C. 648; *Lee v. Luther*, 3 Wood & M. 519; *Walker v. Crews*, 73 Ala. 412; *Pethybridge v. Burrow*, 53 L. T. 5.

³ *Gee v. Liddell*, 35 Beav. 621; *Morton v. Tewart*, 2 Y. & Coll. N. C. 67 (a letter.) See *Pethybridge v. Burrow*, 53 L. T. 5.

423. DONOR RETAINING DEED AND FAILING TO DELIVER IT—FAILURE TO COMMUNICATE WITH TRUSTEE AND DONEE.—When the instrument of gift is in writing and under seal, as a deed, its delivery is not essential to the creation of a trust,¹ nor is it necessary that the donor communicate his intent to the trustee or donee. In all such instances the trust will be upheld unless it is impeached on the ground of fraud, mistake, or surprise.² The court considers his declaration in the deed sufficient evidence of his intent; and although, in such an instance of non-delivery, if there was a valuable consideration for the deed it would not be enforced, yet in the case of a purely voluntary transaction the court will carry into effect the intent set forth in the deed; but if there are circumstances which show that the donor never intended the deed to operate, these will be considered; and the non-delivery is quite a circumstance—may be quite a potent one—to show that no trust was perfectly created, or that it was revocable.³ A donor signed a memorandum containing the words “I authorize my brother to claim as his own, after my death, £150 out of the money lying in the bank of Carlisle, for the service rendered me during my lifetime.” He retained the possession of the document during his lifetime; but the court held that there was a valid

¹ *Ellis v. Secor*, 31 Mich. 185; S. C. 18 Amer. Rep. 178.

² *Way's Trust*, 2 De G., J. & S. 365; *Martin v. Funk*, 75 N. Y. 134; *Donaldson v. Donaldson*, Kay, 711; *Meek v. Kettlewell*, 1 Hare, 464; *Souverby v. Arden*, 1 Johns. Ch. 240; *Jones v. Obenchain*, 10 Gratt. 259; *Hope v. Harman*, 11 Jur. 1097; *Urann v. Coates*, 109 Mass. 581; *Sear v. Ashwell*, 3 Swanst. 411; *Bunn v. Winthrop*, 1 Johns. Ch. 329; *Fletcher v. Fletcher*, 4 Hare, 67; *Garnons v. Knight*, 5 B. & C. 671.

³ *Uniacke v. Giles*, 2 Moll. 257; *Naldred v. Gilham*, 1 P. Wms. 577; *Ward v. Lant*, Prec. Ch. 182; *Birch v. Blagrave*, Amb. 264; *Cecil v. Butcher*, 2 J. & W. 565; *Antrobus v. Smith*, 12 Ves. 39; *Dillon v. Coppin*, 4 M. & Cr. 647; *Cotton v. King*, 2 P. Wms. 358; *Alexander v. Brame*, 7 De G., M. & G. 525; *Otis v. Beckwith*, 49 Ill. 121; *Platamone v. Staple*, Coop. 250; *Evans v. Grey*, 9 L. R. Ir. 539.

declaration of trust, notwithstanding the fact of its remaining in his possession up to the time of his death.¹

424. DONOR UNLAWFULLY OBTAINING POSSESSION OF DEED OF TRUST.—If a donor execute a deed of trust and deliver it, he cannot thereafter revoke the trust by repossessing himself of the deed; and if he do, the beneficiary may maintain a bill to compel him to redeliver the deed, without making the depositary a party, when no breach of trust is charged against him.²

425. DELIVERY OF SUBJECT-MATTER OF GIFT.—If all other acts essential to the validity of a trust are performed a delivery to the *cestui qui trust*, or even notice to him, is not essential to the validity of the gift.³ So if the donor execute his note and deliver it to a trustee to hold until the donor's death and to deliver it to the beneficiary, that is a sufficient delivery to enable the donee to enforce it, especially if it was a conditional gift, on the donee performing some act.⁴

426. NOTICE TO DONEE OR TRUSTEE OF TRUST.—It is not necessary to the validity of a trust that either the donee or trustee shall have notice of the creation of the trust; but the lack of notice is always a circumstance to be considered when the question arises whether the trust has been completely created.⁵ The transfer of property to a

¹ *Armstrong v. Timperon*, 19 W. R. 558; 24 L. T. N. S. 275; *Martin v. Funk*, 75 N. Y. 134.

² *Knye v. Moore*, 1 Sm. & Stu. 61; *Paterson v. Murphy*, 11 Hare, 88; S. C. 17 Jur. 298; 22 L. J. Ch. 832.

³ *Martin v. Funk*, 75 N. Y. 134.

⁴ *Shenstone v. Brock*, 36 Ch. Div. 541; S. C. 56 L. J. Ch. 923; 57 L. T. 249; 36 W. R. 118.

⁵ *Tate v. Leithhead*, Kay, 658; *Wadd v. Hazleton*, 62 Hun, 602; *Beatson v. Beatson*, 12 Sim. 281; *Meek v. Kettlewell*, 1 Hare, 464; *Donaldson v. Donaldson*, Kay, 711; *Bridge v. Bridge*, 16 Beav. 315; *Roberts v. Lloyd*, 2 Beav. 376; *Sloper v. Cottrell*, 6 El. & Bl. 497; *Burn v. Carvalho*, 4 M. & Cr. 690; *Martin v. Funk*, 75 N. Y. 134. A testator cannot by imposing a trust upon his devisee, the object of

person without his knowledge vests the property in him at once, subject to his right to repudiate it when informed of the transfer; and the donor cannot reclaim the property on the ground that the donee has no knowledge of the gift.¹ In an old case² it was said: "The same law of a gift of goods and chattels, if the deed be delivered to the use of the donee, the goods and chattels are in the donee presently, before notice or agreement; but the donee may make refusal *in pais*, and by that the property and interest will be divested."³

427. DONOR DIVESTING HIMSELF OF THE LEGAL TITLE.—If the donor proposes to make a stranger the trustee of the property for the benefit of the donee, and the property is a legal estate capable of a legal transfer and delivery, the legal interest must be actually transferred before the trust is complete.⁴ Thus where an owner of turnpike bonds and shares made a voluntary assignment to a trustee, in trust for himself, and after his death, for his nephew, and delivered the bonds and shares to the trustee, but did not observe the formalities required by the turnpike-road act and the deeds by which the company was formed, to make the assignment effectual; it was held that no interest, in either the bonds or the shares, passed by the assignment, and that the trust was void.⁵

which he does not communicate to him, enable himself to escape the English statute of wills by declaring those objects in an unattested paper, found after his death. During his life he should tell the devisee, and the latter should accept in order to evade the statute: *Boyes v. Carritt*, 26 L. R. Ch. Div. 531; S. C. 53 L. J. Ch. 654; 50 L. T. 581; 32 W. R. 630.

¹ *Standing v. Bowring*, 31 Ch. Div. 282; S. C. 55 L. J. Ch. 218; 54 L. T. 191; 34 W. R. 204; affirming 27 Ch. Div. 341; *Martin v. Funk*, 75 N. Y. 134.

² *Butler and Baker's Case*, 3 Rep. 26 b. (1590).

³ To same effect, *Thompson v. Leach*, 2 Vent. 208; reversing same case, 2 Vent. 198 (1690); *Siggers v. Evans*, 5 El. & B. 367 (1854). See, also, *Neilson v. Elight*, 1 Johns. Cas. 205; *Moses v. Murgatroyd*, 1 Johns. Ch. 119.

⁴ *Meek v. Kettlewell*, 1 Hare, 464; *Coningham v. Plunkett*, 2 Y. & Coll. N. C. 245.

⁵ *Searle v. Law*, 15 Sim. 95; *Price v. Price*, 14 Beav. 598; *Bridge v. Bridge*, 16

Suppose, however, the subject of the trust is a legal interest which cannot be assigned nor transferred at law, what is the rule? By the later authorities there is little doubt that a trust can be created in such an instance. "It is upon legal and equitable principles," said Justice Bruce, "we apprehend clear that a person *sui juris*, acting freely and fairly, and with sufficient knowledge, ought to have, and has it in his power to make in a binding and effectual manner a voluntary gift of any part of his property, whether capable or incapable of manual delivery, whether in possession or reversionary, or howsoever circumstanced."¹ This rule has been adopted in a number of cases.² But where a part of the property was capable of delivery and transfer, and a part not, and the part that might have been assigned was neither delivered nor assigned, it was held that no trust was created.³

Beav. 315; *Beech v. Keep*, 18 Beav. 285; *Tatham v. Vernon*, 29 Beav. 604; *Dilron v. Bone*, 3 Giff. 538; *Ellison v. Ellison*, 6 Ves. 656; *Duffell v. Noble*, 14 Tex. 640; *Lonsdale's Estate*, 29 Pa. St. 407; *Trimmer v. Danby*, 4 W. R. 399; S. C. 25 L. J. Ch. 424; *Milroy v. Lord*, 4 De G., F. & J. 264; S. C. 8 Jur. N. S. 806; 31 L. J. Ch. 798; 7 L. T. N. S. 178; *Parnell v. Hingston*, 3 Sm. & G. 337; *Kiddill v. Farnell*, 3 Sm. & G. 428; *Doty v. Wilson*, 5 Lans. 7; *Cressman's Appeal*, 42 Pa. St. 147; *Gilchrist v. Stevenson*, 9 Barb. 9; *Lane v. Ewing*, 31 Mo. 75; *Henderson v. Henderson*, 21 Mo. 379; *Jones v. Obenchain*, 10 Gratt. 259.

¹ *Kekewich v. Manning*, 1 De G., M. & G. 176; S. C. 21 L. J. Ch. 577; 16 Jur. 625.

² *Wilcocks v. Hannington*, 5 Ir. Ch. 38; *Gilbert v. Overton*, 4 N. R. 420; 2 Hem. & M. 110; 10 Jur. N. S. 721; 33 L. J. Ch. 683; 12 W. R. 1141; 10 L. T. N. S. 900; *Donaldson v. Donaldson*, Kay, 711; *Lambe v. Orton*, 1 Dr. & Sm. 125; *Voyle v. Hughes*, 2 Sm. & Gif. 18; S. C. 23 L. J. Ch. 238; 18 Jur. 341; 2 Eq. Rep. 42; 2 W. R. 143; *Way's Settlement*, 10 Jur. (N. S.) 1166; S. C. 34 L. J. Ch. 49; reversing 4 New. R. 453; *Elliott's Appeal*, 50 Pa. St. 75. *Contra*, *Pearson v. Amicable Office*, 27 Beav. 229; *Sloan v. Cadogan*, Sugd. V. & P. App.; *Fortesque v. Barnett*, 3 My. & K. 36; *Roberts v. Lloyd*, 2 Beav. 376; *Blakely v. Brady*, 2 Dru. & Wal. 311; *Airey v. Hall*, 3 Sm. & Gif. 315; *Parnell v. Hingston*, 3 Sm. & Gif. 337.

³ *Woodford v. Charnley*, 28 Beav. 96. But see *Richardson v. Richardson*, 3 L. R. Eq. 686; S. C. 15 W. R. 690; 36 L. J. Ch. 653.

It should be observed that this section has no application to instances where the donor has constituted himself a trustee.

428. **DONEE DIVESTING HIMSELF OF THE EQUITABLE TITLE.**—If the donor has only an equitable title to the subject-matter of the gift, he may still create a trust of the property by the execution of an assignment of all his interest to a trustee for the donee, and the original settler need not be called upon to do any act. Justice Bruce has very well illustrated this question by saying: “Suppose stock or money to be legally vested in A as a trustee for B for life, and subject to B’s life-interest for C absolutely, surely it must be competent for C, in the lifetime of B, with or without the consent of A, to make an effectual gift of his interest to D by way of pure bounty, leaving the legal interest and legal title untouched. If so, can C do this better or more effectually than by executing an assignment to D”?¹ So it has been held that the beneficiary can direct the trustee to hold his interest thereafter on new trusts;² or he can assign his equitable interest to a stranger in trust for himself.³

429. **FAILURE TO NAME BENEFICIARY.**—A trust does not necessarily fail where the donor has failed to name the donee or beneficiary. Thus where a trust was created by deed, without containing the name of the beneficiary, the person actually intended to receive the benefit was

¹ *Kekewick v. Manning*, 1 De G., M. & G. 176; S. C. 21 L. J. Ch. 577; 16 Jur. 625. Other cases, *Sloan v. Cadogan*, Sugd. V. & P. App.; *Voyle v. Hughes*, 2 Sm. & Gif. 18; S. C. 23 L. J. Ch. 238; 18 Jur. 341; 2 Eq. Rep. 42; 2 W. R. 143; *Lambe v. Orton*, 1 Dr. & Sm. 125; *Gilbert v. Overton*, 2 Hem. & M. 110; *Ways’ Settlement*, 10 Jur. (N. S.) 1166; S. C. 34 L. J. Ch. 49; 2 De G., J. & Sm. 365, reversing 4 New R. 453; *Woodford v. Charnley*, 28 Beav. 96; *Southerland v. Southerland*, 5 Bush. 591.

² *Ryer ft v. Christy*, 3 Beav. 238; *McFadden v. Jenkyns*, 1 Hare, 458; S. C. 1 Phil. 153.

³ *Sloan v. Cadogan*, *supra*; *Wilcocks v. Hannyngton*, 5 Ir. Ch. 38; *Godsal v. Webb*, 2 Keen, 99; *Cotteen v. Missing*, 1 Madd. 176; *Collinson v. Patrick*, 2 Keen, 123. Of course a mere expectancy is not the subject of a trust; *Meek v. Kettlewell*, 1 Hare, 464; affirmed 1 Phil. 342.

allowed to enforce it against the trustee upon the latter's testifying at the trial that the plaintiff was the person intended as the object of the donor's bounty.¹ A deed of gift to a trustee to hold the property in trust for such persons as the donor may thereafter name is valid, but not until the beneficiaries are named according to the mode designated in the deed.² But if it is uncertain who the donee is the trust must fail.³ If the donor was to inform the trustee for whom the trust was created, during his lifetime, merely leaving a paper among his writings, containing the names of the beneficiaries will not be sufficient.⁴

430. DEED OF GIFT AS A TESTAMENTARY INSTRUMENT.—It is no unfrequent occurrence that a deed of gift, or other written instrument of gift, contains words of promise of an entirely future character, not *in præsentia*, but expressing a desire to give, even at the death of the donor. Efforts have been made to support these instruments as wills; and this can usually be done when they are executed in accordance with the statute of wills.⁵ In the case just cited the donor, a mortgagee, wrote the mortgagor, saying: "I now give you this gift, to become due at my death, unconnected with my will. I hereby request my executors to cancel the mortgage deed, bond, indenture, and all papers I may have chargeable on R [the mortgaged estate] at my death, and give [the same]

¹ *Sleeper v. Iselin*, 62 Ia. 583; *Boardman v. Willard*, 73 Ia. 20. But the contrary has been held. See *Holland v. Alcock*, 108 N. Y. 312.

² *Ireland v. Geraghty*, 11 Biss. 465.

³ *Roberts v. Roberts*, 11 Jur. N. S. 992; 14 W. R. 123; 13 L. T. N. S. 492; 12 Jur. N. S. 971.

⁴ *Boyes v. Carritt*, 26 L. R. Ch. Div. 531; S. C. 53 L. J. Ch. 654; 50 L. T. 581; 32 W. R. 630; *King's Estate*, 21 L. R. Ir. 273.

⁵ *Scales v. Maude*, 6 De. G., M. & G. 43; 1 Jur. N. S. 533, 1147; 25 L. J. Ch. 433; 3 W. R. 527; *Dipple v. Corles*, 11 Hare, 183.

to you or your daughter or daughters then living for their own use." It was held that this gift was void, because it was a promise entirely in the future, in the nature of a will.

431. NECESSITY FOR INSTRUMENT OF GIFT TO BE UNDER SEAL.—Elsewhere has been discussed whether a deed or written instrument of gift must be under seal to dispense with an actual delivery of the subject-matter of the gift; and it was there seen that the cases are at variance on the subject. But it may be deemed settled in England that a court of equity will not enforce a voluntary contract or covenant, though it be under seal.¹ In this country it has been intimated that a contract under seal could be enforced² and where the distinction between sealed and unsealed instruments had been abolished by statute, an unsealed voluntary contract was enforced.³

432. DONEE INDUCED TO CHANGE HIS SITUATION BY PROMISE OF DONOR TO GIVE.—The attempt has been made to uphold a promise to give, made by the donor to the donee, when that promise has been such as to induce the donee, to the knowledge or at the request of the donor, to so change his pecuniary situation or condition that a failure to keep the promise would entail upon the donee a definite pecuniary injury or loss. But such a promise, if it fall short of a contract, is not binding, and cannot be enforced, either as a gift outright or as amounting to the creation of a trust. Thus an intestate induced a woman to serve him as his housekeeper without wages

¹ *Hale v. Lamb*, 2 Eden, 292; *Evelyn v. Templar*, 2 Bro. Ch. 148; *Colman v. Sarel*, 3 Bro. Ch. 12; *Kekewich v. Manning*, 1 De G. & M. 176; *Dening v. Ware*, 22 Beav. 184.

² *Kennedy v. Ware*, 1 Barr. 445; *McIntire v. Hughes*, 4 Bibb. 186; *Dennison v. Goehring*, 7 Barr. 175; *Caldwell v. Williams*, 1 Bailey (S. C. Eq.) 175.

³ *Mahan v. Mahan*, 7 B. Mon. 579. But see *Trough's Estate*, 75 Pa. St. 115.

for many years, and to give up other prospects of establishment in life, by a verbal promise to make a will leaving her an estate for her life in his farm, and he afterward made and signed a will, not duly attested, by which he left her the life estate. The court found that there was no contract, no promise to pay wages, that she could have left him, or he could have turned her away, at any time without incurring a liability; that her acts did not constitute a part performance, such as is required by the statute of frauds; and that she could not maintain an action for a declaration that she was entitled to a life estate in the land.¹ So where a land-owner agreed with his brother that if he would forego his intention to move to the West, and marry and settle on a tract of land owned by the former he would convey the land to him in fee, whereby the brother was induced to give up his intention to go West, having incurred no expense by abandoning his design, it was held that there was not such a consideration to support the agreement as a court would decree its performance.²

433. ORDERS ADDRESSED BY A CREDITOR TO HIS DEBTOR OR DEPOSITARY OF A FUND.—A donor may create his debtor or person holding his funds on deposit a trustee for the donee, either by a parol direction to the creditor or depositree or by an instrument in writing directed to him. Thus a donor, when his claim fell due, orally communicated, through a third person, to the debtor a desire that he hold the fund in trust for a designated donor, which the debtor consented to do; it was held that

¹ *Maddison v. Alderson*, 8 L. R. App. Cas. 467; 52 L. J. Q. B. 737; 49 L. T. 303; 31 W. R. 820; affirming 7 L. R. Q. B. Div. 174; 50 L. J. Q. B. 466; 45 L. T. 334; 29 W. R. 556; *Loffus v. Maw*, 3 Giff. 592; S. C. 32 L. J. Ch. 49; 8 Jur. N. S. 607; 6 L. T. N. S. 346; 10 W. R. 513, disapproved; *Peckham v. Taylor*, 6 L. T. N. S. 487.

² *Reed v. Vannorsdale*, 2 Leigh, 569.

there was a valid gift which was binding on the donor's estate.¹ So where a creditor directed his debtor to transfer the debt in his, the debtor's, books to the joint account of himself, the creditor, and his wife, stating that he desired her to have it after his death, and he cancelled the debtor's promissory note which he held for the amount of the debt, and took a new one in the joint names of himself and wife, it was considered, the wife surviving him, that he had created a trust in her favor, and that she was entitled, as survivor, to the note.² Even an unsigned memorandum will be sufficient to create a trust when it is used as a direction by the donor to his debtor to transfer his debt to a trustee or to himself to hold as a trustee; and the trust when thus created is irrevocable.³ But where a testator, who had lent £300 on note, payable on demand, directed the maker, after her death, to pay the interest to her sister for life, and afterward to divide the principal among her sister's children, which the maker agreed to do, and the payee died without having demanded payment of the note, which was found uncanceled among her papers at her death, it was held that she had not parted with her legal title to the money, and that the direction did not create a gift.⁴ A testatrix by will gave to the defendant a legacy of £100, and afterward gave a check on her bankers in favor of A for £150, with verbal directions to apply so much of it as, with the legacy, would purchase a share of stock in a railway company, which she desired to give instead of the legacy, not, however, desiring to alter her

¹ *M'Fadden v. Jenkyns*, 1 Ph. 153; 12 L. J. N. S. Ch. 146; 7 Jur. 27; affirming 1 Hare, 458; 11 L. J. N. S. Ch. 281; 6 Jur. 501.

² *Gosling v. Gosling*, 3 Drew, 335.

³ *Paterson v. Murphy*, 17 Jur. 298; S. C. 22 L. J. Ch. 882. See, generally, *Parker v. Stones*, 38 L. J. Ch. 46; S. C. 19 L. T. N. S. 259; *Thorpe v. Owen*, 5 Beav. 224; S. C. 11 L. J. Ch. N. S. 129; *Crawford's Appeal*, 61 Pa. St. 52.

⁴ *Bulbeck v. Silvester*, 45 L. J. Ch. 280.

will so as to make the addition to the legacy. After the amount of the check was credited to A, the account of the testatrix to that amount was overdrawn. It was held that there was no trust raised nor gift perfected. The court doubted whether the donor had relinquished all dominion over the gift, but did not hesitate to draw the conclusion, and to base its judgment upon it, that "the testatrix intended the arrangement to supply the place of an alteration in her will, and to stand upon the same footing as a will;"¹ and for that reason the gift was void.²

434. COVENANT TO GIVE UPON A CONTINGENCY.—A covenant or agreement to give upon a certain contingency, or when a certain event happens, is nothing more than a promise to give, and is not enforceable, although the contingency comes to pass or the event takes place. Such is a covenant to convey all property which the donor may thereafter acquire, although he may acquire property thereafter; so a covenant to convey by a certain time certain described property, then in existence, if the covenantor by that time acquires the title, and the contingency arose, is nothing more than a promise to give.³

435. DONOR RESERVING CONTROL OVER TRUST FUND AS TRUSTEE.—The gift is not defeated by the fact that the donor reserves control over the gift or fund given as trustee.⁴ Thus a merchant in China wrote to his corre-

¹*Hughes v. Stubbs*, 1 Hare, 476; S. C. 6 Jur. 831.

²*Scales v. Maude*, 3 W. R. 527; 1 Jur. N. S. 533, 1147; 6 De G., M. & G. 43; 25 L. J. Ch. 433. Where a father directed his creditor to give him a note in the name of his, the father's, daughter, and the daughter took it surreptitiously from her father's possession, it was held that the father could not appoint himself trustee for her and make a valid delivery of his own property as such trustee; nor did his promise to give her the note make him a trustee: *Hatton v. Jones*, 78 Ind. 466.

³*Wilkinson v. Wilkinson*, 4 Jur. N. S. 47.

⁴"That a person can so constitute himself a trustee of a fund, reserving to him-

spondents in London to transfer £1,000 from his tea account, and employ it in exchange transactions for the benefit of his children. In subsequent letters he wrote to the same correspondents "that he declined giving any opinion as to the reinvestment of the fund, as he considered he had no further control over it, as it belonged to his children," "that he had appropriated it to them, and his correspondents were to consider it as theirs." His correspondents accordingly opened a separate account, headed "A. V., exchange account on account of children," previously informing him of their intent so to do. The court decreed that a trust was well raised by the first letter in favor of the children, although the fund was still so far in the control of the donor as to be liable to his drawing; and that, too, notwithstanding the donor, in one of his letters, had desired his correspondents to consider it as "subject to the order of his executors" in the event of his death.¹ So where a donor had £3,000 in the hands of her bankers upon their promissory note, and she sent the note to them, directing them to place £2,000 in the joint names of the donees and herself as trustee for them; and they made an entry in their bank-books to her account as trustee for the donees, and gave her a signed receipt or note for it, reading as follows: "Fourteen days after sight I promise to pay H. O. [the donor] trustee for A, C, and B, D, [the donees] or order, £2,000, with interest at 2½ per cent.;" it was held that this was a valid gift, although it is clear that he retained control over the fund by reason of the document which he received.² So where a testator wrote his agent in Paris to purchase an annuity for

self at the same time the control of a trustee over the fund, is clear from many authorities, and amongst others from *Wheatley v. Purr*, 1 Keen, 551; *Vandenberg v. Palmer*, 4 Kay & J. 204.

¹ *Vandenberg v. Palmer*, *supra*.

² *Wheatley v. Purr*, *supra*.

the benefit of Lady A, and the purchase being so made, but in the name of the donor, for the reason that the donee was then insane; and afterward the testator sent a power of attorney to the agent empowering him to transfer the annuity to the donee, but the donor died before the transfer was made, thus working a revocation of the power of attorney, yet the court upheld the gift, upon the ground that he had committed to writing a sufficient declaration that he held that part of his estate in trust for the annuitant.¹

436. REVOCATION.—When a trust has been completely created, by no act of the donor can it be revoked without the consent of the donee, unless he has reserved the power to do so.² This is true even though by some accident the estate has become revested in the donor.³ The donor is

¹ *Ex parte Pye*, 18 Ves. 140. But if all the facts of the case show that the donor did not then intend to relinquish his control over the fund, as the owner, but intended to control it as owner, and not as trustee, the gift is void: *Smith v. Warde*, 15 Sim. 56; *Garrard v. Lord Lauderdale*, 3 Sim. 1; S. C. 2 R. & M. 451; *Hughes v. Stubbs*, 1 Hare, 476; *Gaskell v. Gaskell*, 2 Y. & J. 502 (explained in *Vandenberg v. Palmer*, 4 Kay & J. 204). See *Forbes v. Forbes*, 6 W. R. 92; S. C. 3 Jur. N. S. 1206, where the retention of control by the donor defeated the gift; and *Evans v. Jennings*, 4 Jur. N. S. 551; S. C. 6 W. R. 616, where the trust was upheld because the donor dealt with the fund given as trustee.

² *Sargent v. Baldwin*, 60 Vt. 17; *Light v. Scott*, 88 Ill. 239; *Tolar v. Tolar*, 1 Dev. (N. C.) Eq. 460 (destroyed the deed); *Dawson v. Dawson*, 1 Dev. (N. C.) Eq. 93; *Way's Trusts*, 10 Jur. N. S. 836; S. C. 2 De G., J. & Sm. 365; *Appeal of Ritter*, 59 Pa. St. 9; *Newton v. Acken*, 11 Beav. 145; *Garner v. Germania Life Ins. Co.*, 110 N. Y. 266; *Nearpass v. Newman*, 106 N. Y. 47; *Meiggs v. Meiggs*, 15 Hun, 453; *McPherson v. Rollins*, 167 N. Y. 316; *Gulick v. Gulick*, 39 N. J. Eq. 401; *Williams v. Vreeland*, 32 N. J. Eq. 135; *Cobb v. Knight*, 74 Me. 253; *Sewall v. Roberts*, 115 Mass. 262; *Viney v. Abbott*, 109 Mass. 300; *Dennison v. Goehring*, 7 Barr, 175; *Falk v. Turner*, 101 Mass. 494; *Stone v. Hackett*, 12 Gray, 227; *Hildreth v. Eliot*, 8 Pick. 293.

³ *Ellison v. Ellison*, 6 Ves. 656; *Smith v. Lyne*, 2 Y. & Coll. N. C. 345; *Paterson v. Murphy*, 11 Hare, 88; *Gilchrist v. Stevenson*, 9 Barb. 9; *Uzzle v. Wood*, 1 Jones (N. C.) Eq. 226; *Browne v. Cavendish*, 1 J. & L. 637. All parties interested must consent: *Hellman v. McWilliams*, 70 Cal. 449; and if one be an infant, there can be no revocation: *Isham v. Delaware, etc., R. Co.*, 3 Stockt. (N. J.) 227.

bound, if the trust be completed, though some contingency was forgotten and unprovided for;¹ and if the trust is created by deed a mental or oral revocation is void.² But the donor may reserve the right to revoke the trust;³ and the trust will remain until he exercise his authority under the power reserved.⁴ If the donor provides that the trust estate shall be subject to such debts as he may contract during his life, the reservation is good; and to the amount of the debts contracted it will be revoked, but no further.⁵ And it should be observed generally, that the failure on the part of the donor to reserve the power to revoke the trust is regarded by courts of equity as a circumstance of suspicion, and slight evidence of a mistake or misunderstanding on the part of the donor will enable them to set aside the trust.⁶

437. PREVENTING THE MAKING OF A GIFT BY WILL.

—In a few instances the attempt has been made to create a trust where the donor was prevented from executing a will to create the trust or make a gift, or was informed that it was not necessary to the validity of the proposed gift to include it in his will. Thus where a testator intended to give a note to the maker, and thus cancel the debt, but was advised by the scrivener that he might effectually declare his intention on the back of the note, and he wrote

¹ *Keyer v. Carleton*, 141 Mass. 45.

² *Wallace v. Berdell*, 97 N. Y. 13.

³ *Aubuchon v. Bender*, 44 Mo. 560; *Dean v. Adler*, 30 Md. 147; *Beal v. Warren*, 2 Gray, 447; *Hall v. Hall*, 14 L. R. Eq. 365. See *Pulvertoft v. Pulvertoft*, 18 Ves. 84; *Worrall v. Jacob*, 3 Meriv. 256.

⁴ *Van Cott v. Prentice*, 104 N. Y. 45.

⁵ *Markwell v. Markwell*, 34 Beav. 12.

⁶ *Garnsey v. Mundy*, 24 N. J. Eq. 243; S. C. 13 Amer. L. Reg. 345; *Eaton v. Tillinghast*, 4 R. I. 276; *Russell's Appeal*, 75 Pa. St. 269; *Everitt v. Everitt*, 10 L. R. Eq. 405; *Wallaston v. Tribe*, 9 L. R. Eq. 44; *Coutts v. Acworth*, 8 L. R. Eq. 558; *Prideaux v. Lonsdale*, 1 De. G., J. & S. 433; *Hall v. Hall*, 14 L. R. Eq. 365; S. C. 8 Ch. App. 430; *Evans v. Russell*, 31 Leg. Int. 125; *Nightingale v. Nightingale*, 13 R. I. 113.

on it accordingly; and he frequently spoke to his wife, who was the residuary legatee, that he desired her to deliver up at his death the note to the maker, and she led him to believe that she would do so, and after his death actually promised to do so; it was held that equity would enjoin its collection, and not permit the wife to reap an advantage by her deceitful actions.¹ So if the donor make an absolute bequest of property to another, with a verbal agreement with the legatee that he will, at his death, dispose of the property equally between the donor's and the legatee's relatives, a trust is thereby created in favor of such relatives, which will be enforced by a court of equity if the legatee fail to perform the agreement. In such an instance it is fair to assume that the donor would have directed in his will the course of the property he desired it to take, if it had not been for the legatee's promise.² But it will be observed in each one of these cases that the person violating his promise, or preventing the creation of the trust, reaped a benefit if the trust were overthrown, and it is upon that ground that the cases rest. If the person making the promises receives no benefit under the will, then no trust is created. Thus where the defendant, at the time the testator made his will, promised him to give one of his children as much property as the testator would be able to give his other children, and thereby induced him to give such child a part of his estate, the promise is without consideration, and no trust is created in favor of the child that can be enforced against the person making the promise.³ So where a testatrix, the morning of her

¹ *Richardson v. Adams*, 10 Yerg. 273.

² *McLellan v. McLean*, 2 Head. 684; *Podmore v. Gunning*, 7 Sim. 644; *Williams v. Fitch*, 18 N. Y. 546; *Chamberlaine v. Chamberlaine*, Freem. Ch. 34; *Devenish v. Baines*, Prec. Ch. 3; *Oldham v. Litchfield*, 2 Vern. 506; *Barrow v. Greenough*, 3 Ves. 152; *Hoge v. Hoge*, 1 Watts, 163; *Reech v. Kennegal*, 1 Ves. Sr. 123.

³ *Robinson v. Denson*, 3 Head. 395.

death, called her executor and asked him if he could not as executor cancel and give up a note she held against a third person, and he said he could and so promised; and the executor testified that if he had not made the promise the testatrix would undoubtedly have added a codicil to her will, giving the note to the maker; the court held that there was no valid trust created.¹

438. GOOD OR MERITORIOUS CONSIDERATION.—How far will a good or meritorious consideration support a trust, or authorize a court of equity to enforce a voluntary conveyance? By a good or meritorious consideration is meant that which arises from blood or natural affection between near relatives, or, as Blackstone has it: "Such as that of blood, or of natural love and affection, when a man grants an estate to a near relation, being founded on motives of generosity, prudence, and natural duty."² In England it was decided that such a consideration was sufficient to support a deed and that it would be enforced against the donor in favor of a wife or child.³ This decision, however, was received with disfavor,⁴ and was finally overruled.⁵ So that it may be considered settled in that country that such a consideration is not sufficient for the enforcement of a voluntary trust.⁶ But there is a limitation to this statement. For if the donor execute a voluntary conveyance upon good consideration, and die before the trust is completed, a court will enforce it against

¹ *Sims v. Walker*, 8 Humph. 503.

² 2 Black. Com. 296, 297, 444. See *Potter v. Gracie*, 58 Ala. 303; *Clark v. Troy*, 20 Cal. 219; *Corwin v. Corwin*, 9 Barb. 219, 225.

³ *Ellis v. Nimmo*, L. & G. (Ir.) 333.

⁴ *Holloway v. Headington*, 8 Sim. 324; *Jefferys v. Jefferys*, 1 Cr. & Ph. 138; *Dillon v. Coppin*, 4 My. & Cr. 647.

⁵ *Moore v. Crafton*, 3 Jon. & La. 442.

⁶ *Antrobus v. Smith*, 12 Ves. 39; *Holloway v. Headington*, 8 Sim. 324.

other volunteers under a subsequent settlement;¹ or against devisees or legatees;² or against heirs-at-law or the next of kin,³ though not, of course, against purchasers for value.⁴ In America the tendency is to uphold and enforce such deeds or instruments, with the distinction, perhaps, that they must be under seal;⁵ and they must be made in favor of the wife or a child, and not in favor of a brother, sister, nephew, parent,⁶ or illegitimate child.⁷

439. **MARRIAGE SETTLEMENTS.**—The subject of marriage settlements is foreign to the plan of this book, but it may be remarked that as marriage is a valuable consideration, ante-nuptial contracts will be enforced after the marriage is actually consummated.⁸

¹ *Bolton v. Bolton*, 3 Swanst. 414.

² *Ib.*

³ *Watts v. Bullas*, 1 P. Wms. 60; *Goring v. Nash*, 3 Atk. 186; *Rodgers v. Marshall*, 17 Ves. 294.

⁴ *Finch v. Winchelsea*, 1 P. Wms. 277. A subsequent volunteer cannot defeat the trust by pleading a good consideration: *Goring v. Nash*, 3 Atk. 186; *Rodgers v. Marshall*, 17 Ves. 294. It may even be doubted if a good consideration will be sufficient to support an action for a specific performance in that country. See *Price v. Price*, 14 Beav. 598; *Joyce v. Hutton*, 11 Ir. Ch. 123; *Colman v. Sarrel*, 1 Ves. Jr. 50.

⁵ *McIntire v. Hughes*, 4 Bibb. 186; *Mahan v. Mahan*, 7 B. Mon. 579; *Bright v. Bright*, 8 B. Mon. 194; *Hayes v. Kershow*, 1 Sandf. 258; *Blackerby v. Holton*, 5 Dana, 520; *Tolar v. Tolar*, 1 Dev. (N. C.) Eq. 460; *Caldwell v. Williams*, 1 Baily (S. C.), Eq. 175.

⁶ *Buford's Heirs*, 1 Dana, 107; *Hayes v. Kershow*, 1 Sandf. 258.

⁷ *Fursaker v. Robinson*, Pr. Ch. 475.

⁸ *Caton v. Caton*, L. R. 1 Ch. 137; S. C. 34 L. J. Ch. 564; on appeal L. R. 2 H. L. 127; S. C. 36 L. J. Ch. 886; 14 L. T. 34; 14 W. R. 267; *Kay v. Crook*, 3 Sm. & G. 407; *Goldicutt v. Townsend*, 28 Beav. 445; *Stone v. Stone*, L. R. 5 Ch. 74; *Crane v. Gough*, 4 Md. 316; S. C. 3 Md. Ch. 119.

CHAPTER XVI.

FRAUD AND UNDUE INFLUENCE.

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440. GIFT PROCURED BY FRAUD OR UNDUE INFLUENCE IS VOID.—A gift procured or brought about by fraud or undue influence is void. The fraud or illegal influence that will avoid a gift need not be sufficient to set aside a will procured in the same way. "A gift by will by a *cestui que trust* to his trustee, by a principal to his agent, by a client to his attorney, or by a ward to his guardian, is upheld on less evidence that there was no fraud or undue influence, than is a gift *in presenti*. If, however, the facts disclose that the person taking the benefit be instrumental in procuring the bequest, then the rule would not be modified toward him."¹ In speaking

¹ Decker v. Waterman, 67 Barb. 460; Hindson v. Weatherill, 5 De Gex., M. & G. 301; Parfitt v. Lawless, L. R. 2 P. & D. 462; S. C. 4 Moak, 687.

of the difference between a gift *inter vivos* and by will, with respect to the presumption of undue influence, Lord Penzance said: "In the first place, in those cases of gifts or contracts *inter vivos* there is a transaction in which the person benefited at least takes part, whether he unduly urges his influence or not; and in calling upon him to explain the part he took, and the circumstances that brought about the gift or obligation, the court is plainly requiring of him an explanation within his knowledge. But in the case of a legacy under a will, the legatee may have, and in point of fact generally has, no no part in or even knowledge of the act; and to cast upon him, on the bare proof of the legacy and his relation to the testator, the burden of showing how the thing came about, and under what influence or with what motive the legacy was made, or what advice the testator had, professional or otherwise, would be to cast a duty on him which in many, if not most, cases he could not possibly discharge. A more material distinction is this: The influence which is undue in the case of gifts *inter vivos* is very different from that which is required to set aside a will. In the case of gifts or other transactions *inter vivos* which such relations as those in question involve, executed by those who possess it to obtain a benefit for themselves, is undue influence. Gifts or contracts brought by it are, therefore, set aside unless the party benefited by it can show affirmatively that the other party to the transaction was placed 'in such a position as would enable him to form an absolutely free and unfettered judgment.'"¹

441. AMOUNT OF INFLUENCE NECESSARY TO AVOID GIFT.—The influence that is necessary to render a gift

¹ Parfitt v. Lawless, L. R. 2 P. & D. 462; S. C. 41 L. J. P. 68; 27 L. T. 215; 21 W. R. 200; 4 Moak, 687; Boyse v. Rossborough, 6 H. L. Cas. 1, 49; Archer v. Hudson, 7 Beav. 551; Pressley v. Kemp, 16 S. C. 334; S. C. 42 Am. Rep. 635.

void must be especially directed in favor of the donee, and must be sufficient to destroy the freedom of the donor's will. He must so come under the influence of the person exercising control over him as to become his agent, and be subject to his will.¹ "Undue influence consists in destroying the freedom of the donor's will, so as to make his act rather the will and act of the donee than his own. And such influence must be specially directed to accomplish the thing done. If the mind of the donor was brought to a purpose preconceived by the donee for his own advantage, by an influence the donor could not escape, under the circumstances in which she was placed, and which was deliberately used to effect such purpose, then that influence, or its exercise, was undue and improper."²

442. UNSOUNDNESS of MIND—MENTAL WEAKNESS.—If the donor has sufficient mental capacity to comprehend the transaction his gift will be valid, although he has not the power to transact business generally. Thus where a father gave a son some stock, and at the time he had sufficient mental capacity to transact business with his family, although not to transact business generally, the gift was upheld, there being no suspicion of undue influence or of fraud.³ Mere mental weakness will not authorize a court to set aside an executed gift, if such weakness does not amount to an inability to comprehend the transaction, and is unaccompanied by evidence of imposition or undue influence.⁴ If it is shown that the donor and

¹ *Allmon v. Pigg*, 82 Ill. 149; S. C. 25 Amer. Rep. 303; *Woodbury v. Woodbury*, 141 Mass. 329.

² *Decker v. Waterman*, 67 Barb. 460; *Hamilton v. Armstrong*, 20 S. W. Rep. 1054; *Soberanes v. Soberanes*, 31 Pac. Rep. 910.

³ *Van Deusen v. Rowley*, 8 N. Y. 358; *Kidder v. Stevens*, 60 Cal. 414. See *Riggs v. American Tract Society*, 84 N. Y. 330; *Brault v. Brault*, 1 Leg. News, 495; *Moore v. Moore*, 67 Mo. 192; *Rowland v. Sullivan*, 4 Des. Eq. 516.

⁴ *Willemin v. Dunn*, 93 Ill. 511.

donee bore confidential relations to each other, then a weakness of mind, even though not to the extent of producing mental unsoundness, may operate to overturn the gift, especially if such a gift is a large one in value and consists of nearly all the donor's estate.¹

443. TEMPER AND DISPOSITION OF DONOR.—The temper and disposition of the donor are always facts for consideration. A man of easy temper and yielding disposition is more liable to be imposed upon than one of a resolute disposition and firm temper. This is especially true if he is a person of weak mind. In such an instance the court will look with a jealous eye upon the transaction, and will very strictly examine the conduct and behavior of the donee. If it can discover that any acts or stratagems or undue means have been used to procure the gift; if it see the least speck of imposition at the bottom of the transaction, or that the donor is in such a situation with respect to the donee as may naturally give the latter an undue influence over him; if there be even the least *scintilla* of fraud, the court will interpose and set aside the gift.²

444. AGE OF DONOR—DISEASE.—The age of the donor is always a matter for consideration. An old and feeble man is not always as able to resist the importunities of those near him, especially when his mind is weakened by disease, as a man in the full vigor of life. What might be a valid gift in the latter instance might very probably be void in the former.³ If a person, whose mind is enfeebled by disease or old age, and who is so placed as to be

¹ Woodbury v. Woodbury, 141 Mass. 329.

² Sears v. Shafer, 1 Barb. 408; affirmed 6 N. Y. 268. The declarations of the donor made shortly after the gift, showing incapacity of mind, are admissible in evidence: Howell v. Howell, 59 Geo. 145; Lane v. Moore, 151 Mass. 87.

³ Hall v. Knappenberger, 97 Mo. 509.

subjected to the influence of another person, makes a gift of property to such person, the gift is presumptively void, and the burden rests upon the donee to show that the donor understood the nature of the act, and that the act was not done through the influence of the donee.¹

445. IMPROVIDENT GIFT TO STRANGER.—If a gift is free from the imputation of fraud, surprise, or undue influence; and the donor and donee do not sustain confidential or fiduciary relations to each other, and such gift is spontaneously executed, it will not be set aside by the courts, although it is highly improvident and a mere stranger is the recipient of the donor's bounty.² But if the donor is weak of mind, the amount of the gift is quite a potent factor, especially if it is made to one bearing confidential or fiduciary relations to him.³

446. UNEQUAL DISTRIBUTION OF PROPERTY AMONG CHILDREN.—An heir of the donor cannot insist that a gift be set aside merely by showing that the donor made an unequal or unfair distribution of his property among those who had claims on his bounty. The fact of the unequal distribution may be shown, but that fact must be coupled with other facts of undue influence, fraud, or unsoundness of mind before the gift can be avoided.⁴

447. VALUE OF GIFT—AMOUNT OF DONOR'S REMAINING PROPERTY.—Still another consideration is the value

¹ *Haydock v. Haydock*, 34 N. J. Eq. 570; *Owing's Case*, 1 Bland Ch. 370; *Beeman v. Knapp*, 13 Gr. Ch. 398; *Soberanes v. Soberanes*, 31 Pac. Rep. 910.

² *Willemin v. Dunn*, 93 Ill. 511; *Villers v. Beaumont*, 1 Vern. 100; *Huguenin v. Baseley*, 14 Ves. 273; *Eskridge v. Farrar*, 30 La. Ann. 718; S. C. 34 La. Ann. 709; *Twist v. Babcock*, 48 Mich. 513.

³ *Woodbury v. Woodbury*, 141 Mass. 329. "I think it may be inferred that amount merely may, in a voluntary transaction, be such evidence of improvidence as to shift the onus of proof to the recipient of the bounty:" *Blake, V. C.*, in *Kersten v. Tane*, 22 Gr. Ch. 547.

⁴ *Moore v. Moore*, 67 Mo. 192; *Carty v. Connolly*, 91 Cal. 15.

of the gift. A gift of a large amount of property calls for a greater affection, usually, of the donor for the donee than one of a small value, taking into consideration the amount of the donor's wealth. If the donor had but little affection for the donee, then the gift should be viewed more closely than if he had a great affection for him. Usually men do not act without a motive, unless impelled by some exterior and uncontrollable force, and where a donor has but little or no affection for a donee, we may well look about for some exterior and impelling force. So, too, the amount of the donor's property remaining after he has made a gift is for consideration, unless the gift is trifling in value. A donor will usually not strip himself of property for the benefit of a donee, and run the risk of poverty or want. The amount of the gift, other things being even, is often the turning point in its validity.¹

448. DONEE PREPARING DEED OF GIFT.—Where the donee prepares the deed of gift, the transaction is viewed with suspicion. Indeed such a transaction is viewed very much on the same plane as a gift from client to attorney. "But where a deed is prepared by the person himself, who seeks the benefit of it, without the intervention of any other person, that circumstance alone is sufficient to raise a presumption of fraud ; and the instrument is to be viewed with the greatest jealousy, because the person with whom he deals is thus deprived of the opportunity of any disinterested assistance on the subject ; and for this reason instruments obtained by attorneys from their own clients are always viewed with extraordinary jealousy."²

¹ *Hall v. Knappenberger*, 97 Mo. 509 ; *Sears v. Shafer*, 1 Barb. 408 ; affirmed 6 N. Y. 268.

² *Watt v. Grove*, 2 Sch. & Lef. 492, 503. The solicitor of the donee preparing the deed does not change the presumption : *Hunter v. Atkins*, 3 My. & K. 113 ;

449. GIFT INTENDED TO OPERATE AS A WILL.—Where there was confidential relations existing between the donor and the donee, and the former was old and feeble, and made a gift of property to such donee; and it was obvious that the donor intended the gift to operate as a will, it was held that the latter fact presented an additional reason for imposing upon the donee the burden of showing convincingly the validity of the act.¹

450. MISTAKE.—A gift, though untainted by fraud, will always be set aside if it does not conform to the intention of the donor, or if executed under a total misapprehension as to its effect. In the case of a deed of gift, the question is not, did the donor execute the deed voluntarily, but with full knowledge of the nature, effect, and consequences which the law gives it. To be upheld it must be the pure, voluntary, and well understood act of the donor's mind. The courts will not recognize any deed of gift when it appears that there was any defect in the understanding of the nature of the gift on the part of the donor; if the deed be tainted with the want of complete understanding of its nature by its author, the court must treat it as invalid, and consider that the property did not pass. In such an instance a court of equity will not enforce the deed, nor enforce what the grantor actually intended to do.²

St. Leger's Appeal, 34 Conn. 434; *Sears v. Shafer*, 1 Barb. 408; affirmed 6 N. Y. 268. If a doubt exists as to whether the donor knew all the provisions of the deed, it is void: *Greenfield's Estate*, 14 Pa. St. 489; *Lansing v. Russell*, 13 Barb. 510.

¹ *Haydock v. Haydock*, 34 N. J. Eq. 579; *Wheeler v. Glasgow*, 11 So. Rep. 758.

² *Mulock v. Mulock*, 31 N. J. Eq. 594; S. C. 32 N. J. Eq. 348; *Garnsey v. Mundy*, 24 N. J. Eq. 243; *Anderson v. Elsworth*, 7 Jur. N. S. 1047; S. C. 3 Giff. 154; *Hoghton v. Hoghton*, 15 Beav. 278; *Toker v. Toker*, 31 Beav. 644; *Phillipson v. Kerry*, 32 Beav. 628; *Lister v. Hodgson*, L. R. 4 Eq. Cas. 390; *Coutts v. Acworth*, L. R. 8 Eq. Cas. 558; *Wollaston v. Tribe*, L. R. 9 Eq. Cas. 44.

451. POWER OF REVOCATION, FAILURE TO RESERVE.—Where the gift is in the nature of a settlement, which usually consists of land and articles of great value, the failure to insert in the deed of settlement a power of revocation has the effect to cast upon the transaction a suspicion, and to cast upon the beneficiary the burden of showing that there was a distinct intention of making the gift irrevocable. Such a gift may be set aside.¹

452. WITNESSES TO GIFT.—If the gift is made at a time when the donor is ill and feeble, especially if the donor and donee sustained confidential relations to each other, and it is unusual and rests under circumstances of suspicion, even though slight, the donor must call all witnesses to the transaction and cannot rely upon his own testimony alone.²

453. IMPORTUNING DONOR—PERSUASION.—A donee does not lose his right to retain a gift merely because he importuned the donor to make it, nor because any one else importuned such donor to make it. Mere entreaties or persuasions, even though such entreaties or persuasions bring about the gift, do not avoid it. Any one has a legal right to entreat another for a gift without losing his right to it after it is made. To render a gift made under such circumstances void, the entreaties or persuasions must advance so far as to become the exercise of an undue influence—such as renders the donor a mere agent in

¹ *Miskey's Appeal*, 107 Pa. St. 611; *Russell's Appeal*, 25 P. F. Smith, 289; *Wollaston v. Tribe*, L. R. 9 Eq. 44; *Coutts v. Ackworth*, L. R. 8 Eq. 558; *Hall v. Hall*, L. R. 14 Eq. 365; *Huguenin v. Baseley*, 14 Ves. 273; *Phillipson v. Kerry*, 32 Beav. 628; *Garnsey v. Mundy*, 13 Amer. L. Reg. 345. See Section 118.

² *Chalker v. Chalker*, 5 Redf. 480; *Griffiths v. Robins*, 3 Madd. 191; *Goddard v. Carlisle*, 9 Price, 169; *Nesbit v. Lockman*, 34 N. Y. 167; *Sears v. Shafer*, 6 N. Y. 268.

the hands of the donee to do his will and bidding.¹ A gift *inter vivos* obtained in this manner is, however, presumptively void; and the donee, in order to retain it, where he has obtained the gift by natural influence he possessed over the donor, must affirmatively show that the donor could have formed a free and unfettered judgment in the matter.²

454. BURDEN TO SHOW FRAUD OR UNDUE INFLUENCE.

—The burden to show that the gift was procured by fraud or undue influence rests upon the person who attacks its validity. Proof of facts from which fraud or such influence results as an unavoidable inference is sufficient. In some cases undue influence will be inferred from the nature of the transaction alone; in others from the nature of the transaction, and the exercise of occasional or habitual influence. Evidence of direct influence used at the time the gift is made is not required. It is very often difficult to show by direct proof the undue influence, and direct evidence of the actual exercise of such influence is not expected. Oftentimes the means of keeping the influence out of sight are many and easy of application, and yet the result may be clearly seen. The fact of the influence exerted is very often gathered from all the circumstances attending the donor—his health, age, and mental condition, how far he was dependent upon and subject to the control of the person benefited, the opportunity which the donee had to exercise his influence, and

¹ *Beith v. Beith*, 76 Ia. 601; *O'Neill v. Farr*, 1 Rich. 80; *Soberanes v. Soberanes*, 31 Pac. Rep. 910; *Harrison's Will*, 1 B. Mon. 351; *Walker v. Hunter*, 17 Geo. 364; *Newhouse v. Godwin*, 17 Barb. 236; *Chandler v. Ferris*, 1 Harr. 454; *Calvert v. Davis*, 5 Gill & J. 269.

² *Parfitt v. Lawless*, L. R. 2 P. & D. 462; S. C. 41 L. J. P. 68; 27 L. T. 215; 21 W. R. 200; 4 Moak. 687. The fact that the donor did not have independent advice is not alone sufficient to overthrow the gift: *Soberanes v. Soberanes*, 31 Pac. Rep. 910.

the disposition of the donor to be subjected to it. But the undue influence must be exercised in relation to the gift made, and not as to other transactions, in order to invalidate the gift. Yet if it is shown that at or about the time when the gift was made the donor was in other important particulars so under the influence of the donee, that, as to them, he was not a free agent, but was acting under undue influence, the circumstances may be such as fairly to warrant the conclusion, in the absence of any evidence bearing directly upon the acts done when the alleged gift was actually made, that, in relation to that also, the same influence was exerted. If fiduciary or confidential relations are established between the donor and donee, then the burden is upon the latter to show that the gift was fair and that no undue advantage was taken of the former.¹

455. CONFIDENTIAL RELATIONS.—Certain relations between the donor and donee are deemed to raise a presumption of such an undue influence on the part of the donee as to avoid the gift, and the burden rests upon the donee to show that there was no such influence or no undue advantage was taken of the donor. "For I take the rule to be this," said Lord Brougham; "there are certain relations known to the law, as attorney, guardian, trustee; if a person standing in these relations to client, ward, or *cestui que trust*, takes a gift or makes a bargain, the proof lies upon him, that he has dealt with the other party, the client, ward, etc., exactly as a stranger would have done, taking

¹ Woodbury v. Woodbury, 141 Mass. 329; Chalker v. Chalker, 5 Redf. 480; Boyd v. Boyd, 66 Pa. St. 283; Tenbrook v. Brown, 17 Ind. 410; Drake's Appeal, 45 Conn. 9; Delafield v. Parish, 25 N. Y. 96; Sears v. Shafer, 6 N. Y. 268; Tyler v. Gardiner, 35 N. Y. 559; Howe v. Howe, 99 Mass. 88; Boyse v. Rossborough, 6 H. L. Cas. 2; Rhodes v. Bate, L. R. 1 Ch. 252; Mitchell v. Homfray, 8 Q. B. Div. 588; *In re* Welsh, 1 Redf. 238; Todd v. Grove, 33 Md. 188; Wilson's Appeal, 99 Pa. St. 545; Duncombe v. Richards, 46 Mich. 166.

no advantage of his influence or knowledge, putting the other party on his guard, bringing everything to his knowledge which he himself knew. In short, the rule rightly considered is, that the person standing in such relation must, before he can take a gift, or even enter into a transaction, place himself in exactly the same position as a stranger would have been in, so that he may gain no advantage whatever from his relation to the other party, beyond what may be the natural and unavoidable consequence of kindness arising out of that relation."¹ The grounds upon which a gift between persons holding confidential relations are held *prima facie* void is that of public policy, or, as it is otherwise expressed, of public utility. The relief granted in such cases rests upon general principles applicable to all relations in which dominion is exercised by one person over another.² In the case of a gift between persons sustaining confidential relations to each other, the courts usually require the donee to show that the donor had independent and proper advice before the gift was made, especially where the donor is old and feeble.³

456. PRINCIPAL AND AGENT—PARTNERS.—In the case of a guardian and ward, trustee and beneficiary, and the like, the confidential relations between them implies control or dominion by one over the will of another; in which cases dealings between them are subject to an adverse presumption, because of the opportunities and temptations

¹ *Hunter v. Atkins*, 3 My. & K. 113; *Miskey's Appeal*, 107 Pa. St. 611; *Garvin v. Williams*, 44 Mo. 465; *Yosti v. Loughran*, 49 Mo. 594; *Hall v. Knappenberger*, 97 Mo. 509; *Haydock v. Haydock*, 34 N. J. Eq. 570; *Sears v. Shafer*, 1 Barb. 408; affirmed 6 N. Y. 268; *Kersten v. Tane*, 22 Gr. Ch. 547.

² *Ashton v. Thompson*, 32 Minn. 25.

³ *Beeman v. Knapp*, 13 Gr. Ch. 398; *Sharp v. Leach*, 31 Beav. 424; *Woodbury v. Woodbury*, 141 Mass. 329. See *Parker v. Parker*, 45 N. J. Eq. 224; *Stewart's Estate*, 137 Pa. St. 175; *Duncombe v. Richards*, 46 Mich. 106.

which such a relationship affords for the improper exercise of the dominion thus acquired. But in the case of principal and agent, and partners, such a presumption does not arise, although their dealings are closely scrutinized because of the opportunities and temptations which those relationships afford for the abuse of trust and confidence. In the case of guardian and ward, and the like, confidence as well as control may, and usually does, exist; but in the case of principal and agent, confidence alone exists, while dominion is not implied. It cannot, therefore, be said that an agent, who is the mere creature of the principal and whose appointment is revocable at the latter's discretion, has the same opportunity to dominate his principal as the guardian, whose relationship is conferred by a will other than the ward's, who stands in *loco parentis* to a person under disability, or just removed from it, and where appointment is for a term fixed by law. Dominion is the characteristic feature of the one relationship; trust, of the other. In a matter of dealing between the agent and the principal with respect to the property the subject of the agency, or in respect to the matter in which the agent is employed, such agent must show, to the satisfaction of the court, that he gave his principal the same advice in the matter as an independent and disinterested adviser would have done. He must show that he put his principal in possession of all the facts; for the transaction is presumptively fraudulent. But not so in the case of a gift. He is not an agent for the purpose of taking a gift, or for dealing with the subject-matter of the agency in that manner. In his capacity as agent he exercises no dominion over his principal. Therefore a gift by a principal to his agent, who has ever been his confidential adviser for many years, is valid, unless the party who seeks to set it aside can show that some advantage

was taken of the agent of the relation in which he stood to the donor. And in determining whether the gift was void, after both parties have introduced such evidence as is admissible, the whole field must be surveyed, and the true nature and character of the transaction considered.¹ It may, therefore, be stated as a rule of universal application, that mere proof on the part of the party attacking the validity of a gift on the ground of fraud, that the donee was the agent of the donor, even though the subject-matter of the gift was the subject-matter of the agency, does not raise a presumption that the gift was fraudulent. Something more must be shown before the gift will be overturned.² In such an instance it is not necessary to show that the principal had independent advice.³ If the proof show that the donor knew what he was doing, the value of the thing donated, the exact situation of the property, the effect it would have on his own estate, the condition in which he would be left; if the gift is by deed or a written instrument, that it was read over and explained to him before execution, its contents being fully understood and comprehended—that is sufficient to uphold the gift, and to repel the presumption of fraud arising from proof of the relation of the parties which a few cases still adhere to.⁴

457. GIFT BY CLIENT TO HIS ATTORNEY.—Transactions between an attorney and his client do not stand, in the eye of the law, precisely on the same footing with

¹ *Uhlich v. Muhlke*, 61 Ill. 499.

² *Ralston v. Turpin*, 25 Fed. Rep. 7; *McCormick v. Malin*, 5 Blackf. 509; *Harris v. Tremeneheere*, 15 Ves. 34; *Huguenin v. Basely*, 74 Ves. 273; *Pressley v. Kemp*, 16 S. C. 334; S. C. 42 Am. Rep. 635; *Smith v. Kay*, 7 H. L. Cas. 751.

³ *Ralston v. Turpin*, *supra*.

⁴ *Decker v. Waterman*, 67 Barb. 460. See *Comstock v. Comstock*, 57 Barb. 453; *Platt v. Platt*, 2 T. & C. 29; *Beeman v. Knapp*, 13 Gr. Ch. 398; *Parris v. Cobb*, 5 Rich. Eq. 450.

those which take place between men not connected by any confidential relation. The attitude of an attorney frequently enables him to take an undue advantage of his client, and courts for this reason frequently overlook transactions between them. But to justify interference on the part of the court, it must appear that the attorney excited fear in his client, or exerted his influence to obtain an exorbitant reward, or that the transaction was tainted by fraud, misrepresentation, or circumvention. But when the relationship of attorney and client is dissolved, then they stand upon the same footing as if such relationship had never existed; yet if it be shown that the attorney, by reason of such former relationship, still had an undue influence over his former client, that fact may be well considered in determining the validity of the gift.¹ In an Irish case, where the donee was a solicitor of the donor and claimed that his client had made a gift *mortis causa* of a sum of money then in his hands, the court declined to allow the gift, saying: "This court will not permit a solicitor, having money of his client in his hands, to come out of a room in which his client was—least of all out of a sick-room where his client was at the point of death, and where he was alone with him—and say that the client allowed him to retain for his own purposes a part of the money in his hands. There would be no safety in the ordinary transactions of life if he were allowed to do so; and there is no class upon whom it would press more heavily than the solicitors themselves, for instead of families reposing confidence in them, as they do now, they would be obliged to shut their doors against them, and see that they were not allowed access to their clients except in the presence of witnesses who would prevent anything of the kind taking place. But

¹ Bibb v. Smith, 1 Dana, 580.

the law does not allow such transactions to stand ; it says to the solicitor, if you wish to take a gift from your client, you must call in a third person, and then if the client will confer a benefit upon you, and that he is fully acquainted with the nature of the act he is doing, and is determined to do it, there is nothing to be said against it. But the court cannot allow payment of a sum of money to be enforced against the assets of the client, depending upon a conversation between him and his solicitor, in the absence of third persons, when the client was *in extremis*.”¹ “A client, for example,” said Lord Brougham, “may naturally entertain a kindly feeling toward an attorney or solicitor by whose assistance he has long benefited; and he may fairly and wisely desire to benefit him by a gift, or without such an intention being the predominating motive, he may wish to give him the advantage of a sale or a lease. No law that is tolerable among civilized men, men who love the benefits of civility without the evils of excessive refinement and overdone subtlety, can ever forbid such a transaction, provided the client be of mature age and of sound mind, and there be nothing to show that deception was practiced, or that the attorney or solicitor availed himself of his situation to withhold any knowledge, or exercise any influence hurtful to others and advantageous to himself. In a word, standing in the relation in which he stands to the other party, the proof lies upon him (whereas, in the case of a stranger it would be on those who opposed him) to show that he has placed himself in the position of a stranger, that he has cut off, as it were, the connection which bound him to the party giving or contracting, and that nothing has

¹ *Walsh v. Studdart*, 6 Irish Eq. 161 ; S. C. 4 Sug. Dec. (Ir.) 159 ; 2 Con. & Low. (Ir.) 423. It has been said that it is almost impossible for a gift between attorney and client to stand : *Hatch v. Hatch*, 9 Ves. 292, 296 ; *Watt v. Grove*, 2 Sch. & Lef. 492, 503 ; *Griffiths v. Robins*, 3 Madd. 191.

happened, which might not have happened, had no such connection subsisted.”¹

458. GIFT TO CLERGYMAN.—The gift of a donor to his spiritual adviser is regarded with some degree of suspicion, especially if made as a *mortis causa*. “When a clergyman,” said Lord Sugden, “attends upon a person in his last moments, and sets up a gift from the dying man to himself, the evidence of the transaction ought to be perfectly free from all suspicion, and such as to leave no reasonable doubt in the mind of the court as to its truth. A death-bed is not the fit place, nor the proper time, at which a clergyman of any persuasion should look to his own personal interest, or seek to obtain the property of the dying man. On such an occasion, if a man has a testamentary intention, and the time allows, proper advice should be obtained, some professional person should be sent for, and disinterested witnesses called in; all due solemnities should attend the disposition of the property. Advantage ought never to be taken of a man’s last moments, in order to obtain dispositions of his property, in favor of persons not connected with him by the ties of blood, and I shall always require strong evidence, more especially in the case of a clergyman, before I support a gift made *in extremis*.”² In such an instance the burden

¹ Hunter v. Atkins, 3 My. & K. 113; Gibson v. Jeyes, 6 Ves. 277; Wright v. Proud, 13 Ves. 138; Harris v. Tremeneere, 15 Ves. 40. A gift to his attorney of a part of the property in litigation is void: Berrien v. M’Lane, Hoff. Ch. 421; Howell v. Ransom, 1 N. Y. Leg. Obs. 11; Marshall v. Dossett, 20 S. W. Rep. 810; Anonymous, 16 Abb. Pr. 428. See generally Rose v. Mynatt, 7 Yerg. 30; Planters’ Bank v. Hornberger, 4 Coldw. 531; Starr v. Vanderheyden, 9 Johns. 253; St. Leger’s Appeal, 34 Conn. 434; *In re Smith*, 95 N. Y. 516. Even if it is shown that the gift was made after the relation of attorney and client ceased, it must be shown that the client made the gift, or confirmed one previously made, with a full knowledge of his rights: Tyars v. Alsop, 61 L. T. 8; S. C. 37 W. R. 339; 53 J. P. 212; 5 T. L. R. 242; affirming 59 L. T. 367; S. C. 36 W. R. 919.

² Thompson v. Heffernan, 4 Sug. Dec. (Ir.) 285; Norton v. Rely, 2 Eden, 286.

of showing that the gift was fair is upon the donee, especially if he in any way acted as the agent of the donor.¹

459. **PHYSICIAN AND PATIENT.**—Nearly the same rule seems to prevail with regard to a gift from a patient to his medical attendant that prevails between client and attorney. Thus, where a surgeon, who had attended a poor shoemaker for years and received some compensation for his services, on the latter's daughter being about to marry a nobleman, took a note for much more than his usual charges amounted to, presumably because of the social changes of the shoemaker, brought about by his daughter's marriage, the court declined to allow a recovery for any more than was due by the old scale of fees, because of the confidential relations between them.² So in a recent case it was held that, although there was no rule of law which forbids a man bequeathing his property to his

¹ *Corson's Estate*, 137 Pa. St. 160; *Marx v. McGlynn*, 4 Redf. 455; *Merrill v. Rolston*, 5 Redf. 220, 235; *Drake's Appeal*, 45 Conn. 9; *Kersten v. Tane*, 22 Gr. Ch. 547. In case of a will, when it was shown that the legatee was a Roman Catholic priest, that he had resided with the testatrix and her husband many years as chaplain, and for a part of the time as confessor, being confessor at the time the will was made; but there was no evidence that he had interfered in the making of the will, or that he had procured the gift from the donor to himself, or that he had brought such gift about by coercion or dominion exercised over the testatrix against her will, or by importunity not to be resisted; and it was not shown that even in the common affairs of life, in business, or in anything else, the testatrix was under his dominion or influence; it was held that there was no evidence to go to the jury on an issue of undue influence: *Parfitt v. Lawless*, L. R. 2 P. & D. 462; S. C. 41 L. J. P. 68; 27 L. T. 215; 21 W. R. 200; 4 Moak. 687.

² *Billage v. Southee*, 9 Hare, 534; S. C. 16 Jur. 188; *Ahearne v. Hogan*, 1 Drury (Irish), 310. See *Pratt v. Barker*, 1 Sim. 1; S. C. 4 Russ. 507; *Crispell v. Dubois*, 4 Barb. 393; *Mitchell v. Homfray*, 8 L. R. Q. B. Div. 587; S. C. 50 L. J. Q. B. Div. 460; 45 L. T. (N. S.) 694; 29 W. R. 558; *Blaikie v. Clarke*, 22 L. J. Ch. 377; *Whitehorn v. Hines*, 1 Munf. 559. In Missouri it was held that merely proving that the donor was a man afflicted with a chronic disease, and the purchaser was his family physician, did not warrant an inference of fraud, especially where there were no attending circumstances to corroborate such inference: *Doggett v. Lane*, 12 Mo. 215.

medical attendant, yet it is not a favorable circumstance for one in such a confidential position, with respect to a patient laboring under severe disease, to take a large benefit under such patient's will, more particularly if it be executed in secrecy and the whole transaction assumes the character of a clandestine proceeding. In such a case the burden lies very heavily upon the person benefited to maintain the validity of the will.¹ But, on the contrary, a gift of \$50,000 worth of property by a patient to his physician, by deed, was upheld, and the burden ruled to be on those attacking the validity of the gift to show that it was brought about by undue influence.²

460. ANTE-NUPTIAL AGREEMENTS.—Gifts between persons under an engagement of marriage are closely scrutinized when a charge of fraud or undue influence is made, such persons occupying confidential relations. When such gifts or contracts are drawn in question, every presumption is against their validity, and the burden of proof is cast upon the man, in order to uphold and enforce them.³

¹ *Ashwell v. Lomi*, L. R. 2 P. & D. 477; S. C. 4 Moak. 700. A deed of gift set aside: *Gibson v. Russell*, 2 Y. & C. N. C. 104. A secret agreement to pay \$125,000 for medical services set aside: *Dent v. Bennett*, 4 My. & Cr. 269. An annuity of \$500 for his life, in consideration that the ship surgeon would live with him and take care of him, from an apoplectic patient, set aside: *Popham v. Brooke*, 5 Russ. 8. A dentist holding a draft for \$1,300, in consideration that he would take care of an aged man's teeth, held void and ordered delivered up: *Allen v. Davis*, 4 De G. & S. 133. An aged, feeble, and nearly deaf patient, giving his entire estate to a physician who lived with and took care of him, gift set aside: *Cadwallader v. West*. See, generally, where such gifts are presumptively void: *Rhodes v. Bate*, 35 L. J. Ch. 267; *Greenville v. Tyler*, 7 P. C. 320.

² *Audenreid's Appeal*, 89 Pa. St. 114; S. C. 33 Amer. Rep. 731.

³ *Pierce v. Pierce*, 71 N. Y. 154; S. C. 27 Amer. Rep. 22; *Kline's Estate*, 64 Pa. St. 122; *Tarbell v. Tarbell*, 10 Allen. 278; *Fay v. Rickman*, 1 Busbee's Eq. 278; *Woodward v. Woodward*, 5 Sneed, 49; *Page v. Horne*, 11 Beav. 227; *Cobbett v. Brock*, 20 Beav. 524; *Coulson v. Allison*, 2 De Gex, F. & J. 521; *James v. Holmes*, 31 L. J. (N. S.) Ch. 567; *Kline v. Kline*, 57 Pa. St. 120; *Wollaston v. Tribe*, L. R. 9 Eq. 44; *Rockafellow v. Newcomb*, 57 Ill. 186.

461. **FATHER TO SON.**—There is no presumption that a gift from a father to a son has been procured by unfair dealing,¹ unless it is shown that the gift was an unusual one from an aged and feeble man to a son who has been his confidential adviser or manager.²

462. **SON TO FATHER.**—The influence of a father may be so great over a son, even after he has married and left the parental roof, as to render his gift to the parent voidable, and to cast upon the donee the burden of showing that it was fully understood and devoid of undue influence. This was held especially true where the son made no provision for his own family, the intimacy of the father and son being unusually confidential, and the son being addicted to the use of intoxicating liquors.³

463. **BROTHERS AND SISTERS.**—The mere relation of brother and sister does not impose that confidence which will avoid a gift from one to the other unless it is shown to be fair. If there is nothing in the circumstances showing dependence and trust on the one hand, and the assumed duty of protection and counsel on the other, equity will not compel a brother to treat a sister with more tenderness than any other woman. Such things belong to the imperfect duties, which even a court of equity cannot enforce. Yet if the relation has assumed a confidential character, they must act with the utmost good faith, especially in dealing with regard to inheritances or distributive shares of estates coming to them jointly.⁴

¹ *Tenbrook v. Brown*, 17 Ind. 410.

² *Beeman v. Knapp*, 13 Gr. Ch. 398; *Stewart's Estate*, 137 Pa. St. 175.

³ *Miskey's Appeal*, 107 Pa. St. 611; *Beith v. Beith*, 76 Ia. 601.

⁴ *Million v. Taylor*, 38 Ark. 428; *Dunn v. Chambers*, 4 Barb. 376; *Dunnage v. White*, 1 Swanst. 138; *Stewart v. Stewart*, 7 J. J. Mar. 183; *Boney v. Hollingsworth*, 23 Ala. 690; *Gillespie v. Holland*, 40 Ark. 23.

464. GIFT TO MISTRESS.—If he sees fit, a donor may make a valid gift to his mistress. In such instances, however, the law looks suspiciously for coercion or undue influence; but the burden is not cast upon the donee to show that neither of them was used, nor to show that the donor was at the time a person of sufficient capacity to make the gift.¹ The influence exercised by a mistress donee over the donor to procure the gift may be illegitimate and undue;² but such donee, by mere proof of the gift, is not called upon to show that it was not undue or illegitimate.³

465. GIFT OF INEBRIATE.—The gift of an inebriate, made when he is in a condition to know the effect of his act, is valid, especially if the gift is one proper for him to make;⁴ but if it is not shown that he was fully aware of the consequences of his act, the gift will be set aside.⁵ So, if it is shown that the donor had periods of sobriety in which he was able to attend to business, and it is not shown that he was intoxicated at the time the gift is made, it is not sufficient to avoid the transaction, although it is shown that the donor is a hard drinker, and that the habits of intoxication had affected his health and frequently rendered him unfit for business.⁶

466. WARD TO GUARDIAN—SON TO PARENT.—Courts have always looked with extreme jealousy upon the gift of a ward to his guardian on the latter's becoming of age.

¹ *In re McGuire*, 1 Tucker, 196.

² *Kessinger v. Kessinger*, 37 Ind. 341; *Dean v. Negley*, 41 Pa. St. 312; S. C. 80 Amer. Dec. 620; *Delafield v. Parish*, 25 N. Y. 9.

³ *Monroe v. Barclay*, 17 Ohio St. 302. As between the mistress and one claiming as heir or donee from her paramour, courts will not be overzealous in her favor: *Ralston v. Turpin*, 25 Fed. Rep. 7.

⁴ *Corrigan v. Corrigan*, 15 Gr. Ch. 341.

⁵ *Miskey's Appeal*, 107 Pa. St. 611; *Chapleau v. Chapleau*, 1 Leg. News, 473.

⁶ *Ralston v. Turpin*, 25 Fed. Rep. 7.

Not only is the rule applied to that period of time, but at any time previous thereto, and at any time thereafter so long as it may be sufficient to insure complete emancipation on the part of the ward, and afford him an independent and unbiased opportunity to investigate for himself and see that everything is correct.¹ "The confidential relation of parent and child, and the fiduciary relation of guardian and ward, are among those in which such relief is frequently granted. Equity looks with special jealousy upon donations from a child to a parent when made recently after the child becomes of age, or while he is under the constant and immediate influence of the parent (as, for instance, residing with him), or while his property is in the parent's possession or control.² Donations from a ward to his guardian are regarded with still greater jealousy where the circumstances are such as to give the guardian an ascendancy over the ward, for here the natural and mutual ties and obligations between parent and child are wanting, and the position of the guardian is fiduciary.³ Whether the donation be from a child to a parent or by a ward to his guardian, if the donor is so placed as to be subject to the control or influence of the donee, the *onus* is on the parent or guardian (as the case may be) to show that 'the transaction is righteous.'⁴ In such cases the undue influence is, on grounds of public policy, *prima facie* presumed from the relations subsisting between the

¹ *Garvin v. Williams*, 44 Mo. 465; *In re Van Horne*, 7 Paige, 46; *Hylton v. Hylton*, 2 Ves. Sr. 547; *Hatch v. Hatch*, 9 Ves. 292; *Huguenin v. Baseley*, 14 Ves. 299; *Wood v. Downes*, 18 Ves. 127; *Gale v. Wells*, 12 Barb. 84; *Meek v. Perry*, 36 Miss. 190; *Greenfield's Estate*, 2 Harris (Pa.), 489; *Ashton v. Thompson*, 32 Minn. 25.

² Citing *Wright v. Vanderplank*, 8 De Gex, M. & G. 133; *Baker v. Bradley*, 7 De Gex, M. & G. 597; *Bergen v. Udall*, 31 Barb. 9; *Taylor v. Taylor*, 8 How. 183.

³ Citing *Hylton v. Hylton*, 2 Ves. Sr. 547; *Hatch v. Hatch*, 9 Ves. 292; *Fish v. Miller*, Hoff. Ch. 267.

⁴ Citing *Gibson v. Jeyes*, 6 Ves. 266; *Hoghton v. Hoghton*, 15 Beav. 278.

parties.¹ Substantially the same rule is applied to the case of an ex-guardian, where, notwithstanding the termination of the formal fiduciary relation between him and his ward, he still retains his dominion in fact and his position of influence as respects the ward or his property. This is especially true where the donations called in question are made while (even after his majority) the ward continues to reside with the ex-guardian, or the ex-guardian continues to retain possession or control of the ward's property.² In all these cases where the law infers from the relations of the parties the probability of undue influence on the part of the party having dominion or ascendancy over another, it requires that the influence in fact exercised shall be exerted for the benefit of the person subject to it, and not for the benefit of the party possessing it, otherwise the donations will be promptly set aside."³

467. WIFE TO HUSBAND.—Courts will closely scrutinize gifts from a wife to her husband, and will promptly set them aside, whenever there is good reason to believe that they were procured by the improper exertion of that influence which the relation of the parties to each other puts in the power of the husband. In fact, the transaction will be viewed with a jealous eye, on account of the peculiar facilities enjoyed by the husband for the exercise of improper influence. Still his undue influence is not

¹ Citing *Archer v. Hudson*, 7 Beav. 551; *Hylton v. Hylton*, *supra*; *Hatch v. Hatch*, *supra*; *Williams v. Powell*, 1 Ired. Eq. 460; *Chambers v. Crabbe*, 34 Beav. 457; *Garvin v. Williams*, 44 Mo. 465; *Todd v. Grove*, 33 Md. 188; *Berdoe v. Dawson*, 34 Beav. 603.

² Citing *Hylton v. Hylton*, *supra*; *Hatch v. Hatch*, *supra*; *Pierse v. Waring*, 1 P. Wms. 121 (note).

³ *Ashton v. Thompson*, 32 Minn. 25. Citing *Hoghton v. Hoghton*, *supra*; and *Cooke v. Lamotte*, 15 Beav. 234; *Taylor v. Johnston*, L. R. 19 Ch. Div. 403; S. C. 51 L. J. Ch. Div. 879; 46 L. T. N. S. 219; 30 W. R. 508.

to be presumed from their mere relationship ; it must be shown, either by direct proof or by circumstances from which it may be fairly inferred. When such a gift is drawn in question, it is not unreasonable to suppose that he occupies a prominent place in his wife's affection ; and this fact ought to be cast in the scale upholding the gift rather than in the one overturning it. This affection is ever an evidence of the object that prompted the making of the gift—it shows a reason or motive for it, which is always an important factor in the establishment of a gift.¹ In a case from Kentucky, on this subject, it was said : “ It is not unreasonable or unnatural that an affectionate wife, without children, should make the husband the object of her bounty in preference to those who would be her heirs-at-law if the estate had been left undisposed of, and, therefore, fraud is required to be shown before the chancellor will disturb the conveyance. Nor will this rule be departed from when the wife, during her life, assails the conveyance as having been obtained by fraud, or the exercise of an improper influence by the husband over her. The chancellor, at the instance of the wife, will scrutinize closely the conduct of the husband and the motive influencing the wife to part with her estate, and when the husband, having won the affections of his wife, has such an influence over her as to make her entirely subordinate to his will, the chancellor will not mistake to adjudge that the parties are dealing at arm's length, and hold the wife to the contract, as he would a stranger. The husband will not be allowed to take advantage of the marital relation, so as to invest himself with title to the wife's estate, and then insist upon her ability to resist his importunities, as a reason for making

¹ *Hardy v. Van Harlingen*, 7 Ohio St. 208; *Wilson v. Bull*, 10 Ohio 250; *Cain v. Ligon*, 71 Geo. 692; *Sasser v. Sasser*, 73 Geo. 275.

her stand by the executed agreement, investing him with title.”¹

468. WHO MAY BRING SUIT TO SET ASIDE GIFT.—If the gift is of personal property, the executor or administrator brings the action to set it aside;² but if it is of real estate, or of such property as descends to the heir, then the latter must bring the action, unless it is necessary to sell real estate in order to pay the donor's debts, and then only where there is no other or an insufficient amount of property in value to liquidate such debts.³

¹ *Golding v. Golding*, 82 Ky. 51; *Todd v. Wickliffe*, 18 B. Mon. 866; *Kennedy v. Ten Broeck*, 11 Bush. 241; *Scarborough v. Watkins*, 9 B. Mon. 540; *Black v. Black*, 30 N. J. Eq. 215; *Farmer v. Farmer*, 39 N. J. Eq. 211; *Geibley v. Cox*, 1 Ves. Sr. 517.

² *Woodbury v. Woodbury*, 141 Mass. 329; *Tyars v. Alsop*, 61 L. T. 8; S. C. 37 W. R. 339; 53 J. P. 212; 5 T. L. R. 242; affirming 59 L. T. 367; S. C. 36 W. R. 919.

³ *Twist v. Babcock*, 48 Mich. 513.

If there is no fraud or undue influence alleged, in the case of a gift of personalty, the gift must stand, unless the administrator alleges and proves that the gift is a *mortis causa*, and that there is a deficiency of assets to pay debts: *Fellows v. Smith*, 130 Mass. 378.

CHAPTER XVII.

FRAUDULENT CONVEYANCES.

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| 478. Donor Retaining Apparent Ownership of Gift—Article of Gift. | |
| 479. Gift Void as to Prior Creditors, Regardless of the Amount of the Donor's Property. | |

469. INTRODUCTION.—It is impossible to discuss in this treatise the subject of fraudulent conveyances as fully and broadly as the subject is discussed in works devoted exclusively to that subject. It is necessary to limit the discussion, and simply point out what gifts are and what are not void or voidable as to the creditors of the donor, leaving out all questions of practice, and all questions of intent to cheat, hinder, or delay such creditors or to secretly cover up and hide away property for the benefit of the donor. The cases on this subject with respect to gifts are not altogether in harmony, but many seeming conflicts arise from the peculiar language used in the several statutes of the States.

470. EARLY ENGLISH STATUTES.—At an early date in England the practice arose of debtors transferring their properties to their friends by collusion, in trust for themselves, and then they would flee to privileged places, and force their creditors to unfavorable terms of settlement. To remedy this evil the statutes of 50 Edw. III, ch. 6, and 3 Hen. VII, ch. 4, was enacted, which rendered void all fraudulent gifts of goods and chattels made in trust for the donor, with the intent to defraud creditors. For some reason these statutes were unsatisfactory, because Parliament passed the 13 Eliz., ch. 5, and the 27 Eliz., ch. 4. The former has been the basis of all American legislation on this subject, in many instances been literally copied in its effective parts. By the 13 Eliz., ch. 5, it was, in substance, enacted that all gifts of hereditaments, goods, and chattels, including conveyances or leases of lands, by writing or otherwise, made with intent to delay, hinder, or defraud creditors of the donor and others are rendered clearly and utterly void and of no effect as against the persons so affected, notwithstanding any pretended consideration for the transfer between the parties. Estates and interests in land or chattels lawfully conveyed upon a good consideration and *bona fide*, with notice of the fraud or collusion, are expressly excepted from its operation. The statute of 27 Eliz., ch. 4, was made for the protection of purchasers, and renders void, as against subsequent purchasers of the same lands, tenements, or other hereditaments, all conveyances, etc., made with the intention of defeating them, or containing a power of revocation.¹

471. STATUTES DECLARATORY OF THE COMMON LAW.—The statute of 13 Eliz. is simply nothing more than

¹ The statute 13 Eliz., ch. 5, was confirmed by 14 Eliz., ch. 11, sect. 10, and made perpetual by 29 Eliz., ch. 5, sects. 1, 2.

declaratory of the common law of the land.¹ Lord Coke considered this was beyond peradventure from the use of the word "declare,"² and Lord Mansfield considered that the courts would have attained the same result in the course of time.³ The Supreme Court of the United States, referring to this statute and the 27 Eliz., said that they "are considered as declaratory only of the principles of the common law."⁴ It may be also remarked that these statutes are virtually in force in all the States of the Union, except where expressly or impliedly repealed by statute, as their inheritance of the common law of England.

472. INCORPOREAL PROPERTY.—The language of the early English statutes applies to "goods and chattels," and after much discussion it was finally settled that they did not apply to transfers of choses in action, stock, and the like.⁵ American statutes, however, usually contain language making them expressly applicable to all incorporeal property.

473. FRAUDULENT PURPOSE.—A fraudulent purpose on the part of the donor, or upon the part of both the donor and donee, is unnecessary; for if such was the case, if the donee acted in good faith he would hold the property as against the defrauded creditors of the donor, although the latter expressly designed by such transfer to deprive them of the power to collect their just claims. The mere fact that the gift prevents them from collecting their

¹ Lord Brougham in *Rickards v. Attorney-General*, 12 Cl. & F. 44. See *Barton v. Vanheythuysen*, 11 Hare, 126, 132, and *Ryall v. Rolle*, 1 Atk. 178.

² Co. Lit. 76 a, 290 b; 3 Rep. 82 b.

³ In *Cadogan v. Kennett*, Cowp. 432; *Ex parte Mayor*, 34 L. J. Bkey. 25.

⁴ *Hamilton v. Russell*, 1 Cranch, 97.

⁵ 2 Kent Com. 443, n.

claims is sufficient to defeat the gift, for the law raises the presumption of a fraudulent intent.¹

474. GIFT MUST RENDER DONOR UNABLE TO PAY HIS THEN EXISTING INDEBTEDNESS.—A gift, in order to render it void where no intent to defraud is involved, must have the effect to hinder and delay the donor's creditors in collecting their claims upon him, existing at the time the gift was made. If the donor has sufficient property left to pay his debts, the gift is valid; and before a creditor can set aside the gift he must show that there was not enough property to pay the donor's debts existing at the time the gift was made.² And if the donor acquire prop-

¹ *Freeman v. Pope*, L. R. 5 Ch. 533; S. C. L. R. 9 Eq. 206; 39 L. J. Ch. (N. S.) 143; 21 L. T. (N. S.) 816; *Crossley v. Elworthy*, L. R. 12 Eq. 153; S. C. 40 L. J. (N. S.) Ch. 480; 19 W. R. 842; 24 L. T. (N. S.) 607; *Mackay v. Douglass*, L. R. 14 Eq. 106, 120; S. C. 41 L. J. Ch. (N. S.) 539; 20 W. R. 652; 26 L. T. (N. S.) 721; *Cornish v. Clark*, L. R. 14 Eq. 184; 42 L. J. (N. S.) Ch. 42; 20 W. R. 897; 26 L. T. (N. S.) 494; *Marden v. Babcock*, 2 Met. 99; *Mohawk Bank v. Atwater*, 2 Paige, 54; *Clark v. Depew*, 25 Pa. St. 509.

² *Morgan v. Hecker*, 74 Cal. 540; *Sherman v. Hogland*, 54 Ind. 578; *Lammons v. Allen*, 88 Ala. 417; *Taylor v. Johnson*, 113 Ind. 164; *Noble v. Hines*, 72 Ind. 12; *Bull v. Bray*, 89 Cal. 286; *Bentley v. Dunkle*, 57 Ind. 374; *Morgan v. Ball*, 81 Cal. 93; *Rock Island Stove Co. v. Walrod*, 75 Ia. 479; *Peck v. Lincoln*, 76 Ia. 424; *Threlkel v. Scott*, 89 Cal. 351; *Freeman v. Burnham*, 36 Conn. 469; *Kerrigan v. Rautigan*, 43 Conn. 17; *Dosche v. Nette*, 81 Tex. 265; *Kent v. Lyon*, 4 Fla. 474; *Ingram v. Phillips*, 5 Strob. L. 200; *Hughes v. Roper*, 42 Tex. 116; *Terry v. O'Neal*, 71 Tex. 592; *Hauser v. King*, 76 Va. 731; *Hayes v. Jones*, 2 P. & H. (Va.) 583; *Huston v. Cantril*, 11 Leigh. 136; *In re Grant*, 2 Story, 312; S. C. 5 L. Rep. 11; *Manders v. Manders*, 4 Irish Eq. 434. In Ohio it is said that he must retain clearly and beyond doubt, enough property to pay his debts: *Crumbaugh v. Kugler*, 2 Ohio St. 373; *Godell v. Taylor*, *Wright* (Ohio), 82; *Brice v. Myers*, 5 Ohio, 121; *Oliver v. Moore*, 23 Ohio St. 473; *Combs v. Watson*, 2 Cin. S. C. (Ohio) 523; *Jacks v. Tunno*, 3 Des. Eq. 1; *Strauss v. Ayers*, 34 Mo. App. 248; *Hurley v. Taylor*, 78 Mo. 238; *Caswell v. Hill*, 47 N. H. 407; *Conover v. Ruckman*, 36 N. J. Eq. 493; *Abbott v. Tenney*, 18 N. H. 109; *Strawn v. O'Hara*, 86 Ill. 53; *Virgin v. Gaither*, 42 Ill. 39; *Bay v. Cook*, 31 Ill. 336; *Gridley v. Watson*, 53 Ill. 186; *Kane v. Desmond*, 63 Cal. 464; *Winchester v. Charter*, 12 Allen, 606; *Lerow v. Wilmarth*, 9 Allen, 382; *Winchester v. Charter*, 102 Mass. 272; *Parker v. Proctor*, 9 Mass. 390; *Tootle v. Coldwell*, 30 Kan. 125; *Bennett v. President, etc.*, 11 Mass. 421; *Parkman v. Welch*, 19 Pick. 231; *Davis v. Zimmerman*, 40 Mich. 24; *Fellows v. Smith*, 40

erty after the gift is made and before suit brought, sufficient to pay his indebtedness, the gift, which otherwise would have been open to attack, cannot be declared void.¹ If the old debts are paid off, yet the total of the donor's indebtedness is the same, although new debts, the gift can still be avoided.² If the donor has enough property at the time of the transfer to pay his then existing indebtedness, but it so decrease in value that at the time of the suit to set aside the transfer it is insufficient to pay such indebtedness, the gift will be upheld.³

475. SUBSEQUENT CREDITORS.—The general rule is that subsequent creditors, or creditors whose claims arose after the gift was perfected, cannot impeach it. They are in no way defrauded by the gift.⁴ And even in those States where subsequent creditors may avoid the gift they cannot do so if they had actual or constructive notice of it, even when the donor retain possession after the gift is perfected.⁵

476. SUBSEQUENT AND SUDDEN INSOLVENCY.—The insolvency of the donor arising after the gift from a sudden

Mich. 689; *Cutter v. Griswold*, Walker Ch. (Mich.) 437; *Wood v. Savage*, Walker Ch. (Mich.) 471; *Beach v. White*, Walker Ch. (Mich.) 495; *Chase v. Welsh*, 45 Mich. 345; *Pursel v. Armstrong*, 37 Mich. 326; *Doak v. Runyon*, 33 Mich. 75; *Brown v. Vandermuellen*, 44 Mich. 522; *Behan v. Erickson*, 7 Qub. L. 295; *Bank of Montreal v. Simson*, 10 L. C. 225.

¹ *Chase v. McCay*, 21 La. Ann. 195; *Taylor v. Johnson*, 113 Ind. 164; *Cox v. Hunter*, 79 Ind. 590.

² *Madden v. Day*, 1 Bail (S. C.), L. 337.

³ *Treacey v. Liggett*, 28 Low. Can. Jur. 181.

⁴ *Kerrigan v. Rautigan*, 43 Conn. 17; *Kendrick v. Taylor*, 27 Tex. 695; *Terry v. O'Neal*, 71 Tex. 592; *Stokes v. Oliver*, 76 Va. 72; *Hayes v. Jones*, 2 P. & H. (Va.) 583; *Smith v. Littlejohn*, 2 McCord, 362; *Page v. Kendrick*, 10 Mich. 300; *Dunham v. Pitkin*, 53 Mich. 504; *In re Kellog*, 1 Silver. (N. Y.) Ct. App. 313; affirming 39 Hun, 275; *Wooden v. Wooden*, 72 Mich. 347; *Hoag v. Martin*, 80 Ia. 714; *Peck v. Lincoln*, 76 Ia. 424; *In re McEachran*, 82 Cal. 219.

⁵ *Madden v. Day*, 1 Bail. (S. C.) L. 587; *Cummings v. Coleman*, 7 Rich. Eq. 509; *Pyron v. Parker*, 25 Geo. 17; *Jones v. Morgan*, 6 La. Ann. 630; *Harmon v. Ryan*, 10 La. Ann. 661.

cause that he could not foresee does not render the gift void, if, at the time of the gift, he had a sufficient amount of property to pay his debts.¹

477. GIFT MADE WITH INTENT TO DEFRAUD SUBSEQUENT CREDITORS.—If a gift is made with the intent to defraud subsequent creditors it may be avoided by them. The language of the statute is that any transfer of property made with “intent to delay, hinder, or defraud creditors,” and a conveyance made with such an intent, applies not only to prior but to subsequent creditors. Thus a conveyance by a husband to his wife of all or a greater part of his property, who immediately or soon after the execution of the conveyance contracts debts on credit, is void as against such subsequent creditors.²

478. DONOR RETAINING APPARENT OWNERSHIP OF GIFT—NOTICE OF GIFT.—In some States all gifts are void against the creditors of the donor if he retain the possession and is clothed with the apparent ownership. This is usually by force of some special statute. Thus in Iowa a statute provided that “no sale . . . of personal property, when the vendor . . . retains actual possession is valid against existing creditors or subsequent purchasers without notice, unless a written instrument conveying the same is executed and acknowledged like a conveyance of real estate, and filed for record. . . .” It was

¹ *Buchanan v. McNinch*, 3 S. C. 498; *Izard v. Middleton*, 1 Bail. (S. C.) Eq. 228.

² *Hood v. Jones*, 5 Del. Ch. 77; *Stevens v. Work*, 81 Ind. 445; *Bishop v. Redmond*, 83 Ind. 157; *Thomas v. Degraffenreid*, 17 Ala. 602; *Dosche v. Nette*, 81 Tex. 265; *Raymond v. Cook*, 31 Tex. 373; *Sexton v. Wheaton*, 8 Wheat. 229; *Webb v. Roff*, 9 Ohio St. 430; *Creed v. President, etc.*, 1 Ohio St. 1; *Conover v. Ruckman*, 36 N. J. Eq. 493; *Winchester v. Charter*, 12 Allen, 606; *Thacher v. Phinney*, 7 Allen, 146; *Murphy v. Stewart*, 12 Rev. Leg. 501.

held that this statute applied to a gift, and the donor retaining the visible possession, although he was the husband of the donee, the gift was void.¹

479. GIFT VOID AS TO PRIOR CREDITORS, REGARDLESS OF THE AMOUNT OF THE DONOR'S PROPERTY.—Many of the earlier cases held all gifts void as to prior creditors, regardless of the amount of property left in the donor's hands; and raised, regardless of the intention, a conclusive presumption that such transfers were fraudulent. To this, however, there was a qualification, that where the indebtedness was slight, as for the current expenses of the family, or the debts were inconsiderable as compared with the value of the donor's estate, and the creditor, by his delay or laches, allowed the estate remaining in his hands to be wasted, the transfer would be upheld.²

480. VOID AS TO PRIOR AND AFFECT ON SUBSEQUENT CREDITORS.—If a gift is void as to prior creditors, it is also as to subsequent ones, if there be such prior creditors.³ But here is a sharp conflict of cases; and in many States it is held that as his subsequent debtors gave him credit as he is—for what he has, not for what he once had—they

¹ *McAfee v. Busby*, 69 Ia. 328; *Hesser v. Wilson*, 36 Ia. 152. In such an instance the term "existing creditors" cannot be limited to those only who were creditors when the invalid gift was made. It continues to be invalid until the possession is changed, the instrument recorded, or notice given; and any creditors becoming such while the invalidity continues are, as to that gift, existing creditors: *Fox v. Edwards*, 38 Ia. 215; *Madden v. Day*, 1 Bail. (S. C.) L. 337; *Smith v. Henry*, 2 Bail. (S. C.) L. 118; *Fairley v. Fairley*, 34 Miss. 18; *McWillie v. Van Vacter*, 35 Miss. 428; *Demers v. Lefebvre*, 14 Low. Can. Jur. 241; *Morgan v. Ball*, 81 Cal. 93.

² *Izard v. Middleton*, Bail. (S. C.) Eq. 228; *Brock v. Bowman*, Rich. (S. C.) Eq. Cas. 185; *Richardson v. Rhodus*, 14 Rich. L. 95; *Buchanan v. McNinch*, 3 S. C. 498; *Howard v. Williams*, 1 Bail. L. (S. C.) 575; *Thomas v. Degraffenried*, 17 Ala. 602; *Hamilton v. Hamilton*, 2 Rich. Eq. 355; *Cordery v. Zealy*, 2 Bail. (S. C.) L. 205; *Ruse v. Bromberg*, 88 Ala. 619.

³ *Ingram v. Phillips*, 5 Strobl. L. 200; *Herschfeldt v. George*, 6 Mich. 456.

cannot impeach the gift on the ground that prior creditors are defrauded.¹

481. GIFT INSIGNIFICANT IN VALUE.—By far the greater number of gifts are small in value, and the question of fraud as against the creditors can have but little importance; for if there is a transfer of all the donor's property, or the greater part of it, a fraudulent intent, at least on the part of the donor, pervades the entire transaction, and the design of the donor to confer a benefit upon the donee is usually absent. Gifts of small value, although the donor be hopelessly insolvent, will be usually not set aside. The value of the gift is always material to the character of the transaction; and it must always be of sufficient value to pay for the expense of its sale by an officer on execution.²

482. GIFT OF PROPERTY EXEMPT FROM EXECUTION.—A gift of property exempt from execution cannot be impeached either by the donor's prior or subsequent creditors; and it matters not whether the article given was of the kind especially exempted by the statute, or it, taken in connection with the debtor's other property, is less in value than the amount of the property allowed a debtor against whom an execution has been issued.³

483. HUSBAND MAY GIVE HIS SERVICES TO HIS WIFE —FATHER'S EMANCIPATION OF HIS MINOR CHILD.—If a

¹ *Crumbaugh v. Kugler*, 2 Ohio St. 373; *Webb v. Roff*, 9 Ohio St. 430; *Creed v. President, etc.*, 1 Ohio St. 1.

² *French v. Holmes*, 67 Me. 186; *Patridge v. Gopp*, Amb. 596. But see *Cordery v. Zealy*, 2 Bail. (S. C.) L. 205; and *Ruse v. Bromberg*, 88 Ala. 619.

³ *Furman v. Tenny*, 28 Minn. 77; *Morrison v. Abbott*, 27 Minn. 116; *Carhart v. Harshaw*, 45 Wis. 340; *Delashmut v. Trau*, 44 Ia. 613; *Smith v. Rumsey*, 33 Mich. 183; *Derby v. Weyrich*, 8 Neb. 174; *Washburn v. Goodheart*, 88 Ill. 229; *Hixon v. George*, 18 Kan. 253. See *Herschfeldt v. George*, 6 Mich. 456.

husband give his wife the benefit of his labor by bestowing it or working upon her property, she is not liable to his creditors; although at the time she accept or receive it he is totally insolvent.¹ But it has been held that a father may not give his son his services when he is insolvent,² though the weight of authority is against this holding.³ Yet a husband may give his wife her earnings, although he is at the time hopelessly insolvent.⁴

484. *DONATIO MORTIS CAUSA*.—A *donatio mortis causa* is always subject to the payment of the donor's debts, if his estate should prove insolvent; and his administrator or executor may recover the subject-matter of such a gift for that purpose. If, after satisfying the donor's indebtedness, any part of the gift or its proceeds should be left, the donee is entitled to such part or to such proceeds.⁵

485. *FRAUDULENT GIFT BINDING BETWEEN DONOR AND DONEE*.—A gift that is void as to the creditors of the donor is binding as between the donor and the donee; neither can impeach it on this ground; nor can the donor impeach it on the ground that it is a fraud on his creditors and he desires to satisfy their just claims. Only the creditors, or the donor's administrator for them, can impeach the transaction.⁶

¹ *Aldridge v. Muirhead*, 101 U. S. 397; *Buckley v. Dunn*, 67 Miss. 710. But if a husband put improvements with his own money on his wife's land, it is a fraud on his creditors: *Ware v. Hamilton Shoe Co.*, 92 Ala. 145.

² *Moody v. Walker*, 89 Ala. 619.

³ *Wambold v. Vick*, 50 Wis. 456; *Atwood v. Holcomb*, 39 Conn. 270; *Lackman v. Wood*, 25 Cal. 147.

⁴ *Carpenter v. Franklin*, 89 Tenn. 142. If he give her a home it is not a fraud as to his subsequent creditors, merely because he shares and enjoys the home with her: *Edgerly v. First Nat. Bank*, 30 Ill. App. 425.

⁵ *Kiff v. Weaver*, 94 N. C. 274; *Emery v. Clough*, 63 N. H. 552; *Mitchell v. Pease*, 7 Cush. 350; *Tate v. Hilbert*, 2 Ves. Jr. 111; *Chase v. Redding*, 13 Gray, 418; *Michener v. Dale*, 23 Pa. St. 59; *Lewis v. Bolitho*, 6 Gray, 137.

⁶ *Harmon v. Harmon*, 63 Ill. 512; *Spaulding v. Blythe*, 73 Ind. 93; *Sherman v.*

486. FRAUDULENT DONEE LIABLE TO DONOR'S CREDITORS.—If the gift is void as to the donor's creditors, whether the fraud is actual or only constructive, the donee must account to them for its value, or for so much as will pay their claims,¹ or he may turn over the subject-matter of the gift to the officer holding a writ of execution against the donor. The donee is in no sense an innocent purchaser for value, and does not occupy the position of such a purchaser.²

487. GIFT BY A THIRD PERSON TO ANOTHER'S CHILD.—A gift to a child when his father is insolvent cannot be questioned by the latter's creditors.³

488. GIFT BY HUSBAND IN FRAUD OF HIS WIFE OR CHILDREN.—A husband may make a gift of his personal property and thereby deprive his wife and children of all interest therein. She and they have no interest in such property until his death, and, therefore, he may wholly disregard her and them, and make a gift of his property, either *inter vivos* or *mortis causa*.⁴

Hogland, 73 Ind. 472; Barkley v. Tapp, 87 Ind. 25; McLean v. Weeks, 65 Me. 411. Of course, one not a creditor of the donor cannot impeach the gift: Edwards v. Ford, 2 Bail. (S. C.) L. 461.

¹ Priest v. Conklin, 38 Ill. App. 180.

² Strauss v. Ayers, 34 Mo. App. 248; McLean v. Weeks, 65 Me. 411. S. C. 61 Me. 277.

³ Snow v. Copley, 3 La. Ann. 610.

⁴ Pringle v. Pringle, 59 Pa. St. 281; Ellmaker v. Ellmaker, 4 Watts, 89; Parthimer's Estate, 1 Pears. 433; S. C. 16 Pitts. L. J. 235; 1 Leg. Gaz. Rep. 478; Chase v. Redding, 13 Grav. 418; Lines v. Lines, 142 Pa. St. 149; Schwartz's Estate, 17 Phila. 435; S. C. 42 Leg. Int. 16; Ford v. Ford, 4 Ala. (N.S.) 142; Smith v. Hines, 10 Fla. 253.

CHAPTER XVIII.

GIFTS IN FRAUD OF MARITAL RIGHTS.

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489. INTRODUCTION—AN EARLY CASE.—One of the earliest cases upon the subject of frauds upon marital rights was *Strathmore v. Bowes*.¹ The case is *sui generis*. Lady Strathmore was the owner of a large amount of property, both real and personal; and while in treaty for a mar-

¹ Reported on appeal, 1 Ves. Jun. 22; and on first and second hearing in 2 Bro. C. C. 345, 1 Sm. L. Cas. 471; and 2 Cox 28; A parallel case, with the duel left out, in *Wilson v. Daniel*, 13 B. Mon. 343.

riage with a Mr. Gray, she conveyed it all to trustees for her sole and separate use notwithstanding any coverture. Gray approved of this conveyance. A few days afterward a Mr. Bowes fought a duel on her account, and she thereupon determined to marry Bowes, which she did within a day or so, and after the conveyance to trustees. Bowes, at the time of the marriage had no knowledge of this conveyance, but he did have knowledge of the fact of her former ownership of property. He filed a bill to set aside the settlement, but the court refused to do so. In affirming the decree dismissing the bill, Lord Thurlow delivered a characteristic opinion: "As to the morality of the transaction," said he, "I shall say nothing. They appear to have been pretty well matched. Marriage, in general, seems to have been Lady Strathmore's object; she was disposed to marry anybody, but not to part with her money. This settlement is to be considered as the effect of a kind of lucid interval, and if there can be reason in madness by doing this she discovered a spark of understanding. The question which arises upon all the cases is whether the evidence is sufficient to raise fraud. Even if there had been a fraud upon Gray, I would not have permitted Bowes to come here to complain of it. But there was no fraud, even upon Gray, for it was with his consent; so I cannot distinguish it from a good limitation to her separate use. Being about to marry Gray she made this settlement with his knowledge, and the imputation of fraud is that, having suddenly changed her mind and married Mr. Bowes, in the hurry of that improvident transaction, she did not communicate it to him; but there was no time, and could be no fraud, which consists of a number of circumstances. It is impossible for a man, marrying in the manner Bowes did, to come into equity and talk of fraud." It is somewhat difficult to say

upon exactly what principle this case was decided. In the first part of his opinion Lord Thurlow seems to consider that the principle by which a husband is relieved from a conveyance under such circumstances is the rule of law that inasmuch as the law charges the husband with the wife's debts or burdens, therefore he is entitled in full to his marital rights; but in the latter part of his opinion, as above quoted, he says that the question in all these cases is one of fraud, meaning no doubt actual fraud. The latter view is no doubt the correct view of this case, for in a later case Lord Eldon said: "I should be very unwilling to relax a principle which has long prevailed both at law and in equity, that if a representation is made upon the circumstances of a person about to form a connection in marriage, and the representation is of such a nature that if not made good, or, if varied, it will materially affect the circumstances in life of that party, courts both of law and equity will hold the party bound to make good that representation."¹ In *Lady Strathmore's* case it will be observed that at the time she made the conveyance she had no intention whatever of defrauding her future husband, and at that time she had no intent whatever of marrying the gentleman she afterward married. Mr. Bowes by inquiry could have easily ascertained that a conveyance of the property had been made; and if she had, on such inquiry, concealed this fact from him, he would not have been without a remedy. Justice Buller in deciding this same case says, speaking of a case where a woman has never been married: "Fraud as applied to cases of this nature, is falsely holding out an estate to be unfettered, and that the intended husband will, as such, be entitled to it when in fact it is disposed of from him." After reviewing the cases he announces the result as fol-

¹ *De Manneville v. Crompton*, 1 Ves. & B., p. 355.

lows: "If the wife is guilty of any fraud, and holds out to the husband that there is nothing to interfere with his right, then any deed executed by her, in prejudice of such representation, shall be void." Bare concealment he declares is not sufficient.¹ Justice Buller also announces the rule to be that a court of equity will not decree the wife's conveyance void until the husband makes a settlement upon her.

490. GENERAL RULE.—In a more recent case the Master of the Rolls declared the rule to be as follows, to render a conveyance by the wife fraudulent: "It must be made out in evidence, that, at the time of the execution of the settlement, marriage was in the contemplation of the parties; that the woman executed the settlement in contemplation of the future marriage; and that she concealed it from her future husband. If these facts be proved, the cases have established the principle that such a settlement cannot stand against the marital right of the husband." In the case from which this quotation is made it appeared that a woman, ten months before her marriage, but after the commencement of that intimate acquaintance with her future husband which ended in marriage, made a settlement of a sum of money which he did not know her to be possessed of. The marriage then took place, she concealing from him both her right to the money and the existence of the settlement. The settlement was conditioned to pay the interest to her during her life, for her separate use, and after her death upon trust for such person or persons as she should by deed or will appoint; and in default of appointment for her next of kin. Ten years afterward she died, and her husband then filed a bill to have the money paid to him. It was held that the settle-

¹ 2 Cox, 28.

ment was void, because it was a fraud upon his marital rights.¹ There was no evidence in the case that the husband ever knew of the settlement until after her death, so that the principle applicable to acquiescence in the settlement did not apply. As early as 1686 a similar case arose in the court of chancery. Before her marriage Lady Dayrill, without her future husband's privity, conveyed her estate to the Earl of Dorset and his heirs, in trust that they should permit such persons to receive the rents and profits, and dispose of them, as she, whether covert or not, should appoint. It does not appear whether marriage negotiations were pending at the time of the conveyance or not, but the court decreed the conveyance void, and ordered that the land be conveyed to the six clerks, subject to the order of the court.²

¹ *Goddard v. Snow*, 1 Russ. 485.

² *Carleton v. Earl of Dorset*, 2 Vern. 17; S. C. Eq. Ca. Abr. 59, pl. 3; *Blanchet v. Foster*, 2 Ves. Sr. 264; *Cotton v. King*, 2 P. Wms. 358; S. C. 2 Eq. Ca. Abr. 53, pl. 10; *Ball v. Montgomery*, 2 Ves. Jr. 191; S. C. 4 Bro. C. C. 339; *Hunt v. Mathews*, 1 Vern. 408; *Poulson v. Wellington*, 2 P. Wms. 533; *Lance v. Norman*, 2 Ch. Rep. 79; *Howard v. Hooker*, 2 Ch. Cas. 81; *Thomas v. Williams*, Mose, 177. "The other and main ground of reliance is that the deeds were in fraud of the intended husband's rights, upon the principle that a voluntary conveyance by a woman, while marriage is in contemplation, is avoidable by the husband from whom it was concealed, or who, at least, had no notice of it. This principle has been often laid down, but it has been very rarely acted upon to the extent of avoiding by judicial decision a conveyance in fraud of the future husband's rights. In almost all the cases where the principle is recognized, there were circumstances which the court laid hold of to escape from the application of the rule, or which really took those cases out of the rule. . . . The cases are either such as ended in allowing the conveyance to stand, on account of something which prevented the application of the principle, while it was in general terms recognized; or such as ended in setting aside the conveyance upon grounds wholly independent of the principle; or such (and these are extremely few—two or three, at most) as applied the principle to setting aside the conveyance, but in circumstances of gross fraud and even conspiracy. . . . Yet it is certain that all the cases in which the subject is approached treat the principle as one of undoubted acceptance in this court; and it must be held to be the rule of the court, to be gathered from a uniform current of *dicta*, though resting upon a very slender foundation of actual decision touching the simple point:" Lord Brougham in *St. George v. Wake*, 1 My. & K. 610 (1833); *Blithe's Case*, Freem. Ch. 91; *M'Donnell v. Hesilrige*,

Some of the earlier cases held, apparently, that there must be actual fraud proved, and that a constructive fraud is not enough; but this rule is now well doubted. As early as 1842 it was held by the Vice-Chancellor of England that the husband was not required to prove actual fraud or deception, if, after the commencement of the treaty of marriage, the intended wife secretly disposed of her property. The Vice-Chancellor held that deception would be inferred.¹ American cases strongly lean to the

16 Beav. 346; *Chambers v. Crabbe*, 34 Beav. 457; *Maber v. Hobbs*, 2 Y. & Col. 317; *Doe v. Lewis*, 11 C. B. 1035. *American authorities*: *Tucker v. Andrews*, 13 Me. 124; *Land v. Jeffries*, 5 Rand. 211; *Fletcher v. Ashley*, 6 Gratt. 332; *Williams v. Carle*, 2 Stock. (N. J.) Ch. 543; *Logan v. Simmons*, 3 Ired. Eq. 487; *Logan v. Simmons*, 1 Dev. & Bat. L. 13 (not a fraud at law); *Goodson v. Whitfield*, 5 Ired. Eq. 163; *Poston v. Gillespie*, 5 Jones Eq. 258; *Joyner v. Denny*, *Busbee Eq.* 176; *Linker v. Smith*, 4 Wash. 224; *Terry v. Hopkins*, 1 Hill, Ch. (S. C.) 1; *Ramsay v. Joyce*, 1 McMull Eq. 236; *Manes v. Durant*, 2 Rich. Eq. 404 (said to be an innocent purchaser for value); *Cummings v. Coleman*, 7 Rich. Eq. 509; *McClure v. Miller*, 1 Bailey Eq. 107; *Waller v. Armistead*, 2 Leigh, 11; *Belt v. Ferguson*, 3 Gr. (Pa.) 289; *Robinson v. Buck*, 71 Pa. St. 386 (grantee must show that he had no knowledge of the fraud perpetrated on the husband); *Duncan's Appeal*, 43 Pa. St. 67; *McAfee v. Ferguson*, 9 B. Mon. 475; *Wilson v. Daniel*, 13 B. Mon. 348; *Leach v. Duvall*, 8 Bush. 201; *Cheshire v. Payne*, 16 B. Mon. 618; *Hobbs v. Blandford*, 7 T. B. Mon. 469; *Cole v. O'Neill*, 3 Md. Ch. 174; *Jordan v. Black*, *Meigs*, 142; *Saunders v. Harris*, 1 Head. 185 (a question of actual fraud); *Green v. Goodall*, 1 Coldw. 404; *Hall v. Carmichael*, 8 Baxt. 211 (each case judged by its own circumstances); *Butler v. Butler*, 21 Kan. 521; S. C. 30 Am. Rep. 441; *Freeman v. Hartman*, 45 Ill. 57; *Kelly v. McGrath*, 70 Ala. 75; *Cranston v. Cranston*, 4 Mich. 230; *Brown v. Bronson*, 35 Mich. 415 (it does not change the fraudulent transaction into a valid one by reason of the fact that the deed was executed to carry out a previous purpose, which is concealed from the wife and from the public, and not brought to light until after the death of the grantor); *Dearmond v. Dearmond*, 10 Ind. 191; *Smith v. Smith*, 2 Halst. Eq. 515; *Jenny v. Jenny*, 24 Vt. 324; *Gainor v. Gainor*, 26 Ia. 337; *Hamilton v. Smith*, 57 Ia. 15; *Chandler v. Hollingsworth*, 3 Del. 99; S. C. 17 Am. L. Reg. 319 (in this last case it is held that the wife cannot claim an interest in personal property thus fraudulently disposed of); *Baker v. Chase*, 6 Hill, 482 (not void at law); *Youngs v. Carter*, 50 How. Pr. 410; S. C. 1 Abb. N. C. 136; 10 Hun, 194 (to his daughters); *Reynolds v. Vance*, 1 Heisk. 344 (actual fraud necessary); *Brewer v. Connell*, 11 Humph. 500 (void by statute); *Babcock v. Babcock*, 53 How. Pr. 97; *Gregory v. Winston*, 23 Gratt. 102; *Anonymous*, 34 Ala. 430; *Prather v. Burgess*, 5 Cranch. C. C. 376.

¹ *Taylor v. Pugh*, 1 Hare, 608; *Spencer v. Spencer*, 3 Jones Eq. 404; *Tisdale v. Bailey*, 6 Ired. Eq. 358.

proposition that the mere conveyance, without his knowledge, is such a fraud upon him as entitles him to relief.¹

491. MERE CONCEALMENT—ACTUAL FRAUD.—Something in repetition it may be said that proof of direct misrepresentations by a wife as to her property, or of willful concealment with intent to deceive him, entitles him to relief if he has suffered an injury; but proof of mere concealment is not always enough, it has been said, to afford the husband relief. It may or it may not, according to circumstances. The vesting and continuance of a separate power in his wife over property which ought to have been his, and which is, without his consent, made independent of his control, is a surprise upon him, and might, if previously known, have induced him to abstain from marriage. “Nevertheless, cases have occurred in which concealment, or rather the non-existence of communication to the husband, has been held fraudulent,² and whether fraud is made out must depend on the circumstances of each case—as an unmarried woman has a right to dispose of her property as she pleases, and as a conveyance made immediately before her marriage is *prima facie* good, it is to be impeached only by the proof of fraud.”³

¹Strong v. Menzies, 6 Ired. Eq. 544; Tisdale v. Bailey, 6 Ired. Eq. 358; Jones v. Cole, 2 Bailey L. 330; Belt v. Ferguson, 7 Gr. (Pa.) 289; Robinson v. Buck, 71 Pa. St. 386 (*prima facie* a fraud); McAfee v. Ferguson, 9 B. Mon. 475; Wilson v. Daniel, 13 B. Mon. 348; Leach v. Duvall, 8 Bush. 201.

²Goddard v. Snow, 1 Russ., p. 490, for instance.

³England v. Downs, 2 Beav. 522. “With the exception of *Goddard v. Snow*, indeed, there will not be found any direct authority for holding that the bare fact of the husband not knowing what had been done is enough without more, so that the transaction is fraudulent and void as against him, although nothing has been done to mislead him; and the authorities of *Buller, J.*, in one of the cases of *Lady Strathmore v. Bowes*, and of Lord Eldon, in *De Manneville v. Crompton*, are directly and strongly the other way. Yet even in *Goddard v. Snow*, it is to be observed that the peculiar circumstances of the length of time which first the courtship, and then the coverture lasted, plainly showed a willful and continued

492. REASONS FOR THE RULE.—At the time this rule had its origin there were some reasons for it. Then a man marrying a woman became liable for all her previous indebtedness, and as an indemnity against these the law gave him all her personal property, the rents and profits of her lands and the right to control them, and an estate by curtesy in such lands, if they had issue, during his life. To, therefore, allow her to secretly dispose of her lands and property, without his consent and knowledge, immediately before the marriage, was a substantial fraud upon him and his marital rights, and hence the reason for the rule.¹

493. HUSBAND MUST BE IGNORANT OF THE CONVEYANCE UNTIL AFTER THE MARRIAGE.—If the husband has any knowledge of the conveyance at any time before the marriage, he cannot complain; for he may break off the marriage without fear of subjecting himself to a suit for damages, at any time before its consummation. It therefore devolves upon him to show that he had no knowledge of the conveyance until after the marriage.² The presumption is that the husband had knowledge of the conveyance before he married, and he must negative this presumption both in his pleading and in his evidence or he will fail.³ Where a husband, before his marriage

suppression of the fact:" *St. George v. Walker*, 1 My. & K. 610. See 2 Cox, 28. Actual fraud must be shown: *Butler v. Butler*, 21 Kan. 521; S. C. 30 Am. Rep. 441; *Gregory v. Winston*, 23 Gratt. 102.

¹ *England v. Downs*, 2 Beav. 522.

² *England v. Downs*, 2 Beav. 522; *Williams v. Carle*, 2 Stock. (N. J.) Ch. 543; *St. George v. Wake*, 1 My. & K. 610, 618; *Taylor v. Pugh*, 1 Hare, 608; *Downer v. Jennings*, 32 Beav. 290; *Terry v. Hopkins*, 1 Hill Ch. (S. C.) 1; *McClure v. Miller*, 1 Bailey Eq. 107; *Cheshire v. Payne*, 16 B. Mon. 618.

³ *St. George v. Wake*, *supra*; *Taylor v. Pugh*, 1 Hare, 608; *Griggs v. Staplee*, 2 De G. & Sm. 572. In this last case both the husband and wife joined in a bill to set aside the conveyance, and the court said relief would be afforded if certain necessary proof be forthcoming: *Lewellin v. Cobbold*, 1 Sm. & Giff. 376.

had sufficiently early notice that it was intended to settle the bulk of the intended wife's property, and nothing passed to justify a belief, on the husband's part, that, at the time of the marriage, no such settlement had been made, it was held that the husband was not entitled to set aside a settlement which it appeared had been made before the marriage, although he was no party to it, and was not proved to have been actually cognizant of any settlement having been made.¹ A mere rumor before marriage, which he does not believe, that she has conveyed her property is not sufficient notice to defeat a recovery.² It has also been held that if the knowledge of the conveyance is acquired after the engagement and before the marriage, the husband may yet proceed with the marriage and then have the conveyance annulled.³ But in Kentucky this view was entirely repudiated. "As it is essential," said the Supreme Court of that commonwealth, "to constitute fraud, that the husband should remain ignorant of the transaction until the marriage ceremony takes place, it follows as a necessary consequence that his knowledge of it at any time previous to that period will operate to prevent him from impeaching the conveyance on the ground of fraud. In reference to his knowledge the law fixes but one period, and that is the time of the marriage; it does not draw any nice distinctions with respect to the length of the time before that period, but considers any previous time as sufficient, and leaves the husband to act for himself, according to his own sense of justice and propriety. Until the marriage actually takes place he is at liberty to retreat, and the law justifies him

¹ *Wrigley v. Swainson*, 3 De G. & Sm. 458.

² *Spencer v. Spencer*, 3 Jones Eq. 404. In this case it was held that the defense must show that he knew of the transfer before the marriage. See, also, *Hobbs v. Blandford*, 7 T. B. Mon. 469.

³ *Poston v. Gillespie*, 5 Jones Eq. 258.

in so doing, if he be notified that his intended wife, without his assent, made a settlement of her estate that will be prejudicial to his marital rights. But, if with this knowledge, acquired at any time before the marriage actually takes place, he voluntarily complies with his previous engagement, he cannot complain that he was deceived, nor will the transaction be deemed to be a fraud upon his rights as husband. As, therefore, the husband has admitted that he was informed of the transaction before the marriage ceremony was performed, he cannot assail it on the ground that it was fraudulent as to him, although that information was only imparted to him after he had arrived at the place fixed for the wedding, and a few moments only before the marriage did take place.”¹

494. CONVEYANCE BEFORE TREATY OF MARRIAGE ENTERED UPON.—A conveyance to be fraudulent must be made after a treaty of marriage has been entered upon, for if made before that period there can be no fraud upon the husband. A general intent to protect the property from a future husband with no particular one in view, and before such future husband has in any way indicated his desire of marriage with the future wife is not a fraud.² Thus where in August a widow, having a second marriage in contemplation, settled her property on herself for life, for her separate use, with remainder to the children of her first marriage—the settlement being prepared in August by her directions, without the privity or assent “of her then intended husband”—in a suit to carry the settlement into execution, the second husband insisted

¹ *Cheshire v. Payne*, 16 B. Mon. 618 (overruling on this point *Hobbs v. Blandford*, 7 T. B. Mon. 469); *Ashton v. M'Dougall*, 5 Beav. 56. In Maryland he is chargeable with constructive notice by the registration of the deed: *Cole v. O'Neill*, 3 Md. Ch. 174; *Jordan v. Black*, Meigs, 142; *Gainor v. Gainor*, 26 Ia. 337.

² *Cotton v. King*, 2 P. Wms. 358.

that it was void, but it was not shown that in August he was "the intended husband," although the marriage took place in the following October; it was held that the evidence was insufficient to impeach the deed.¹

495. INTENDED WIFE DEALING WITH HER PROPERTY BEFORE HER ENGAGEMENT.—A question of much delicacy arises with respect to the woman's dealing with her property after her engagement, or in fact, after she has entered upon a treaty of marriage. Both parties often have a marriage in view long before there is an actual binding obligation entered into. The matter of courtship may even extend over a number of years; and to say to the wife that she may not dispose of her property, even by gift, during these years is to either deprive her of the right of disposing of her property as any other ordinary individual, or to compel her to break off all attentions on the part of the man, or to put her in the indelicate position of asking his leave to sell or dispose of her property before he is under any obligation to marry her. In questions of this kind it is not too harsh a rule to hold that the intended husband loses his right to an interest in her property by not with reasonable speed pressing his suit to an engagement; but if the delay is occasioned by the intended wife's obstinacy or delay, then he does not. But after the engagement, even though the day of marriage is delayed by his non-action, he has a right to be consulted before she disposes of her property. Yet here arises a second delicate question, if he is the cause of the delay. Must she demand a speedy marriage, or be de-

¹ *England v. Downs*, 2 Beav. 522; *Poston v. Gillespie*, 5 Jones Eq. 258; *Cummings v. Coleman*, 7 Rich. Eq. 509; *Cheshire v. Payne*, 16 B. Mon. 618; *Cole v. O'Neill*, 3 Md. Ch. 174; *Gainor v. Gainor*, 26 Ia. 337; *Baird v. Stearne*, 15 Phila. 339; S. C. 39 Leg. Int. 374 (an engagement is not necessary to render the conveyance void); *Gregory v. Winston*, 23 Gratt. 102.

prived of her right of disposal for a long period of time; must she present to him the alternative of marrying her at once or of losing his prospective right to an interest in her property? or must she altogether break off the marriage engagement in order to dispose of her property? These are questions unanswered by the courts; but common sense would seem to indicate that here, too, by his laches he may lose his prospective right in her property.¹

496. CONVEYANCE OF PART OF PROPERTY.—Whether or not the mere conveyance of a part of her property, without any actual intent of defrauding her husband, was a sufficient fraud to set it aside was doubted in one case; but it was held that if the facts clearly show that she intended to deceive and defraud him, it would be such a fraud as he would be entitled to relief against.²

497. WIFE FRAUDULENTLY REPRESENTING HERSELF POSSESSED OF PROPERTY.—Should the wife, in her treaty of marriage, fraudulently represent herself as the owner of real or personal property, with the intent thereby to induce her suitor to marry her, when in fact she owned none, he is without a remedy. So “the non-acquisition of property, of which he had no notice, is no disappointment.”³ And the same is true where the husband deceive his intended wife. “A wife acquires by marriage no right to the property of her husband, and she cannot maintain a bill in equity to set aside a deed of gift executed by him

¹ See *Poston v. Gillespie*, 5 Jones Eq. 258; *Butler v. Butler*, 21 Kan. 521; S. C. 30 Am. Rep. 441. That an actual engagement is not necessary to render the conveyance void, see *Baird v. Stearne*, 15 Phila. 339; S. C. 39 Leg. Int. 374.

² *Logan v. Simmons*, 3 Ired. Eq. 487. In Kansas, where it was not shown that all of the husband's property had been conveyed by him, that fact was allowed much weight in deciding the case against the wife: *Butler v. Butler*, 21 Kan. 521; S. C. 30 Am. Rep. 441.

³ *England v. Downs*, 2 Beav. 522.

previous to the marriage, on the ground that he continued in possession, and that she married him under the impression that the property was his.”¹

498. THE WIFE'S PROPERTY NEED NOT HAVE BROUGHT ABOUT THE MARRIAGE.—It cannot be said with strictness that the wife's property must have brought about the marriage; for where the husband never knew until after his marriage that the wife was possessed of property, then such property can in no way have induced him to marry her. But in England, up to 1833, there was but one case of this kind,² and there the husband succeeded.

499. HUSBAND IGNORANT OF HIS INTENDED WIFE OWNING PROPERTY.—In a line with the preceding section it is immaterial that the husband, at the time of the marriage, was ignorant of the fact that his wife was the owner of property. In several of the cases cited the husband knew nothing of the fact of her ownership until after her death. His equity does not rest upon his knowledge of what she owns at the time she marries him; but upon his marital rights in all her property which she owned at the time the treaty of marriage is entered upon.³

500. WIFE INCUMBERING HER LAND—LEASES.—What is true of a wife secretly conveying her lands is also true if she secretly place a mortgage upon, or executes a lease of them. Both acts are frauds upon the husband.⁴

¹ *Gibson v. Carson*, 3 Ala. 421; *Cranson v. Cranson*, 4 Mich. 230; *Tate v. Tate*, 1 Dev. & B. Eq. 22; *Klein v. Wolf-ohn*, 1 Abb. N. C. 134; *Wier v. Still*, 31 Ia. 107. But see, as to wife's right of action, Section 515.

² *Goddard v. Snow*, 1 Russ. 485.

³ *Taylor v. Pugh*, 1 Hare, 608; *Lewellin v. Cobbold*, 1 Sm. & G. 376; *Chandler v. Hollingsworth*, 3 Del. 99; S. C. 17 Am. L. Reg. 319.

⁴ *Thomas v. Williams*, Mose, 177; *King v. Cotton*, Mose, 259; *Busenbark v.*

501. RELEASE OF A DEBT OR LEGACY.—If the intended wife has a valid claim against a third person, whether secured or not, and secretly releases it before her marriage, the release will be set aside on the application of the husband; and the same is true of a legacy that she may have released.¹

502. CIRCUMSTANCES OF THE PARTIES—PECUNIARY MEANS OF THE HUSBAND.—Lord Brougham, after reviewing all the cases up to the date of his decision (1833), said: "Furthermore, the cases would even seem to authorize us in taking all the circumstances of the parties into consideration, as the meritorious object of the conveyance, and the situation of the husband in point of pecuniary means."² But this rule may be well denied, for the husband's equity does not rest upon his own lack of property, but upon his having been inequitably deprived of a right to and in property which the assumption of the marriage obligation gave him.³

503. WIDOW WITH CHILDREN CONVEYING ESTATE.—The English courts regard a conveyance by a widow with children, just before her marriage, fraudulent much more quickly or with less evidence of fraud than in the case of a woman without children.⁴ But even here special circumstances may take the case out of the rule making such conveyance fraudulent. Thus where a widow, previously to her marriage with a second husband, assigned

Busenbark, 33 Kan. 572; *Kelly v. McGrath*, 70 Ala. 75; *M'Wade v. Brodhurst*, 34 L. T. N. S. 924, affirming 24 W. R. 232.

¹ *Thomas v. Williams*, Mose, 177.

² *St. George v. Wake*, 1 My. & K., p. 623; *Jordan v. Black*, Meigs, 142; *Thomas v. Williams*, Mose, 177; see *M'Wade v. Brodhurst*, 34 L. T. N. S. 924, affirming 24 W. R. 232.

³ *Taylor v. Pugh*, 1 Hare, 608; *Tisdale v. Bailey*, 6 Ired. Eq. 358.

⁴ *Poulson v. Wellington*, 2 P. Wms. 533; *Green v. Goodall*, 1 Coldw. 404.

over the greatest part of her property to trustees as a provision for the children of her former marriage, the settlement was supported by the court, on the ground that it was made for a proper object—namely, to provide for the children she had by her first husband, before she put herself and them under the power of a second husband.¹ But in all such instances, in order to not render the conveyance void, she must act without a fraudulent intent toward her second husband.² Where a mother, the day before her marriage, executed a deed to her daughter to secure a debt due her, it was held to be valid.³ In America it is held that even though the wife only intends to secure her children, yet as against her second husband the conveyance is void, and especially is this true if she convey all her property.⁴

504. CONSIDERATION FOR CONVEYANCE, INCUMBRANCE OR DEBT.—If there was a valuable consideration for the conveyance, or incumbrance placed upon the land or property, though concealed from the husband, the contract is valid; and this is also true of a debt contracted.⁵ Thus where a woman, just before her marriage, secretly

¹ *Hunt v. Mathews*, 1 Vern. 408; S. C. Eq. Ca. Ab. 59, pl. 5; *Thomas v. Williams*, Mose, 177; *Jordan v. Black*, Meigs, 142.

² *England v. Downs*, 2 Beav. 522; *King v. Cotton*, Mose, 259. The Master of the Rolls very much doubted the decision in *Hunt v. Mathews* on this point: *Downes v. Jennings*, 32 Beav. 290, 295. See, also, *Williams v. Carle*, 2 Stock. (N. J.) Ch. 543; *Logan v. Simmons*, 3 Ired. Eq. 487.

³ *Fletcher v. Ashley*, 6 Gratt. 332; *Gregory v. Winston*, 23 Gratt. 102.

⁴ *Goodson v. Whitfield*, 5 Ired. Eq. 163; *Tisdale v. Bailey*, 6 Ired. Eq. 358; *Terry v. Hopkins*, 1 Hill Ch. (S. C.) 1; *Ramsay v. Joyce*, 1 McMull. Eq. 236; *Manes v. Durant*, 2 Rich. Eq. 404; *Jones v. Cole*, 2 Bailey L. 330; *McClure v. Miller*, 1 Bailey Eq. 107; *McAfee v. Ferguson*, 9 B. Mon. 475; *Wilson v. Daniel*, 13 B. Mon. 348; *Leach v. Duvall*, 8 Bush. 201; *Butler v. Butler*, 21 Kan. 521; S. C. 30 Am. Rep. 441 (actual fraud must be shown); *Hamilton v. Smith*, 57 Ia. 15 (actual fraud must be shown); *Baird v. Stearne*, 15 Phila. 339; S. C. 39 Leg. Int. 374 (husband to his children, a fraud); *Pomeroy v. Pomeroy*, 54 How. 228 (to his mother).

⁵ *Blanchet v. Foster*, 2 Ves. Sr. 261.

assigned part of her property to her sister the court took into consideration the meritorious object of the conveyance.¹ The absence of a consideration is a factor strongly in favor of the husband.² If an intended wife secretly conveys property to pay an antecedent debt, on the eve of her marriage, the husband cannot set it aside until he has paid the debt.³ But a conveyance for a consideration, with intent to defraud the husband, is void because of the actual fraud perpetrated.⁴

505. INNOCENT PURCHASER FROM FRAUDULENT GRANTEE.—A purchaser for value, without notice of the fraud perpetrated, takes a valid title, and cannot be disturbed in it.⁵ It is otherwise with a purchaser having knowledge of the fraud,⁶ or who is a mere donee.⁷

506. HUSBAND SEDUCING HIS INTENDED WIFE.—A husband by his conduct toward his intended wife may preclude his equity to have a secret conveyance made by her during the treaty of marriage set aside; such as where he deprives her of the power of retiring from the marriage, or of stipulating for a settlement. Thus where a husband, during the marriage treaty, seduced his wife, taking her to his own house and living with her, the court refused to set aside a secret settlement of her property

¹ *St. George v. Wake*, 1 My. & K. 610; *Fletcher v. Ashley*, 6 Gratt. 332; *Jones v. Cole*, 2 Bailey L. 330; *McClure v. Miller*, 1 Bailey Eq. 107; *Gregory v. Winston*, 23 Gratt. 102.

² *Downes v. Jennings*, 32 Beav. 290.

³ *Jones v. Cole*, 2 Bailey L. 330.

⁴ *Cheshire v. Payne*, 16 B. Mon. 618, 630; *Freeman v. Hartman*, 45 Ill. 57.

⁵ *Joyner v. Denny*, Busbee Eq. 176.

⁶ *Taylor v. Rickman*, Busbee Eq. 278; *Kelly v. McGratt*, 70 Ala. 75; S. C. 45 Am. Rep. 75; *Brewer v. Connell*, 11 Humph. 500.

⁷ *Jenny v. Jenny*, 24 Vt. 324. *Quære*, is the solicitor of the intended wife liable, who knows of the fraudulent intent of the wife and draws the deed to enable her to perpetrate the fraud? See *Kelly v. Rogers*, 1 Jur. N. S. 514.

made by her in favor of herself and future children, although no precedent could be cited on the point.¹

507. INTENDED HUSBAND MISREPRESENTING HIS OWN PROPERTY TO HIS INTENDED WIFE.—The fact of the intended husband misleading his wife by false representations of his own wealth is an important factor in affording him relief as against her secret conveyance of her own property. A husband thus deceiving his wife does not come into a court of equity with immaculate hands, nor will his cries of woe receive as careful consideration as they otherwise would. It of itself is not a complete defense, but it is a potent factor to be considered with other facts.²

508. ACQUIESCENCE BY HUSBAND AFTER THE MARRIAGE.—Although it clearly appears that the husband acquired a knowledge of the conveyance, and he acquiesced in anything done under it, yet that will not purge the transaction of fraud and render it valid. Still it is evidence tending to show a communication of the fact before the marriage.³

509. DELAY IN BRINGING SUIT TO SET ASIDE CONVEYANCE.—In some of the cases an action to set aside the conveyance was brought long after it was made; but usually in these instances the husband has remained in ignorance of the conveyance until shortly before suit brought—in a few cases, until after his wife's death. Where a husband delayed bringing the suit two years

¹ Taylor v. Pugh, 1 Hare, 608; Anonymous, 34 Ala. 430.

² Saunders v. Harris, 1 Head, 185.

³ Logan v. Simmons, 3 Ired. Eq. 487; Durcan's Appeal, 43 Pa. St. 67; Ashton v. McDougall, 5 Beav. 56; S. C. 6 Jur. 447; 11 L. J. (N. S.) Ch. 447; Saunders v. Harris, 1 Head, 185. Effect of confirmation after marriage, see Prather v. Burgess, 5 Cranch C. C. 376.

and a half after obtaining knowledge of the fraud, it was held that his laches did not bar his right to a recovery. Speaking of this delay the court said: "It is not suggested that any loss of evidence, material for the decision of this case, has occurred, by reason of this delay, and in my opinion this court would be pushing to an extreme length the principle on which it acts, where delay is held to deprive a plaintiff of the relief he would otherwise be entitled to, if, in a case of this character and where time does not place the parties in a different position, it were to refuse to aid the husband."¹ But where a wife transferred stock, and the husband married her in ignorance of the transfer but soon after found it out, yet delayed until after her death to bring suit, which occurred seventeen years after the marriage, relief was denied.² Yet where the wife the day before the marriage transferred all her property to a distant relation, which was carefully concealed from the husband during his life, which was a period of only four years; and during that whole time he was permitted to use and treat the property as his own, it was held that the conveyance could be set aside, even though he had heard a rumor that his intended wife intended to convey the property, which he did not believe.³

510. ACTION BY PERSONAL REPRESENTATIVES OF HUSBAND—HEIRS.—The right to set aside such a fraudulent conveyance seems to be personal to the husband, and dies with him. Thus where an intended wife conveyed bonds and stock in trust for herself, married, and the husband

¹ *Downes v. Jennings*, 32 Bear. 290; *Williams v. Carle*, 2 Stock. (N. J.) Ch. 543; *Duncan's Appeal*, 43 Pa. St. 67.

² *Loader v. Clarke*, 2 Mac. & G 382.

³ *Spencer v. Spencer*, 3 Jones Eq. 404; *Poston v. Gillespie*, 5 Jones Eq. 258. But see *Hamilton v. Smith*, 57 Ia. 15, as to a rumor unbelieved.

died in ignorance of her ownership of the bonds and stock ; and then the wife brought suit against the trustees to compel a reconveyance to her, and succeeded, it was held that the heirs of the husband could not then maintain an action against her to compel a conveyance to them.¹ But in a South Carolina case the executor of the husband was allowed to maintain the action, the wife surviving the husband.²

511. HUSBAND'S CREDITORS ATTACKING CONVEYANCE.—The creditors of the husband cannot attack the conveyance, although he owed them at the time of the marriage, and he was then insolvent and consented to the conveyance. Such a conveyance is not within the statute of frauds, for he is not the grantor and it is only to the latter that it applies.³

512. HEIR OF WIFE ATTACKING HUSBAND'S FRAUDULENT CONVEYANCE.—In Delaware it is held that an heir of the wife cannot attack the husband's secret conveyance made on the eve of their marriage ; for the reason that the conveyance is only a constructive fraud, and her heirs have not the equity she possessed to have the deed set aside.⁴

513. THE DECREE.—In setting aside the conveyance the court will direct a proper provision for the wife, although the suit be instituted by the husband, to recover her property, which he has not yet reduced to possession.⁵

¹ *Grazebrook v. Percival*, 14 Jur. (O. S.) 1103 ; *Chandler v. Hollingsworth*, 3 Del. Ch. 99 ; S. C. 17 Amer. L. Reg. 319.

² *Spencer v. Spencer*, 3 Jones Eq. 404.

³ *Land v. Jeffries*, 5 Rand. 211 ; *Perryclear v. Jacobs*, 2 Hill Ch. (S. C.) 504. *Contra*, *Westerman v. Westerman*, 25 Ohio St. 500.

⁴ *Chandler v. Hollingsworth*, 3 Del. Ch. 99 ; S. C. 17 Amer. L. Reg. 319.

⁵ *Tucker v. Andrews*, 13 Me. 124 ; *Kenny v. Udall*, 5 Johns. Ch. 464. The court of South Carolina declined to follow the rule of the Maine case : *Tisdale v. Bailey*, 6 Ired. Eq. 358.

But in the great majority of instances the judgment has been simply an annulling of the fraudulent conveyance, or a decree compelling the fraudulent grantee to reconvey the property to the wife, in the case of personalty. No doubt an accounting can be decreed of the rents and profits received by the wife's grantee. In the case of personal property a judgment in conversion, if the proper demand has been made, for the value of the property would not be improper.

514. HUSBAND SECRETLY CONVEYING HIS PROPERTY.

—In a South Carolina case, in a dictum, it is said that the intended husband can no more convey his property without his intended wife's consent than she can convey her property without his; that both are equally bound.¹ If the intended husband secretly conveys his property, even to his children, he will be bound, but they take it subject to her rights in case she survive him;² and before his death she may maintain an action to have the conveyance declared void so far as it may deprive her of dower in the lands in case she survive him, but no farther.³ But where the husband, a few days before his marriage, conveyed two farms to his children which he represented to his wife that he owned, and she remained in ignorance of the conveyance until after his death, which took place several years after his marriage, and during the marriage he made ample provision for her, and for her two children by a former husband, and no evidence was given of the amount of property he died seized of, the court refused to set aside the

¹ *Poston v. Gillespie*, 5 Jones Eq. 258.

² *Leach v. Duvall*, 8 Bush. 201; *Petty v. Webb*, 6 B. Mon. 468; *Gaines v. Gaines*, 9 B. Mon. 295; *Petty v. Montague*, 7 B. Mon. 55; *Gainor v. Gainor*, 26 Ia. 337; *Chandler v. Hollingsworth*, 3 Del. Ch. 99; S. C. 17 Am. L. Reg. 319.

³ *Petty v. Petty*, 4 B. Mon. 215; S. C. 39 Am. Dec. 501; *Swaine v. Perine*, 5 Johns. Ch. 482; S. C. 9 Am. Dec. 318.

conveyance at her suit, because no actual fraud was shown.¹ Yet where a husband permitted, previous to his marriage, with a view of defeating the marital rights of his wife, fraudulent judgments to be taken against him, it was held that his wife, even during coverture, could maintain an action to have them declared a nullity so far as they affected her inchoate interests in her husband's lands.² The same was held true of a mortgage.³

515. WHEN WIFE MAY SUE—RIGHT OF ACTION.—The wife may bring an action to protect her contingent or inchoate interest in her husband's real estate before he dies; she is not compelled to wait until his death. This is abundantly established by authority.⁴ At his death she may bring her action for dower the same as if no conveyance had ever been made,⁵ or proceed in equity to secure her rights. So a husband may bring the action during

¹ *Butler v. Butler*, 21 Kan. 521; S. C. 30 Am. Rep. 441; *Hamilton v. Smith*, 57 Ia. 15.

² *Busenbark v. Busenbark*, 33 Kan. 572; *Thayer v. Thayer*, 14 Vt. 107; S. C. 39 Am. Dec. 211; *Buzick v. Buzick*, 44 Ia. 259; *Beck v. Beck*, 64 Ia. 155; (*contra*, *Stewart v. Stewart*, 5 Conn. 317); *Holmes v. Holmes*, 3 Paige, 363; *Baird v. Stearne*, 15 Phila. 339; S. C. 39 Leg. Int. 374; *Pomeroy v. Pomeroy*, 54 How. Pr. 223; *Baker v. Chase*, 6 Hill, 482 (not void at law); *Youngs v. Carter*, 50 How. Pr. 410; S. C. 1 Abb. N. C. 136; 10 Hun, 194 (to his daughters).

³ *Kelly v. McGrath*, 70 Ala. 75. Generally, *Reynolds v. Vance*, 1 Heisk. 344 (actual fraud necessary); *Killinger v. Reidenhauer*, 6 S. & R. 531 (a mortgage); *Crecelius v. Horst*, 4 Mo. App. 419 (a husband, after marriage, purchased land, and had it conveyed to his daughter in order to defeat his wife's dower: void; *Jiggitts v. Jiggitts*, 40 Miss. 718; *Babcock v. Babcock*, 53 How. Pr. 97; *Drury v. Drury*, *Wilmot's Opinions*, 177; S. C. 4 Bro. Ch. 506, note. Lord Hardwicke held "that if a man, before marriage, conveys his estate privately, without the knowledge of his wife, to trustees, in trust for himself and his heirs in fee, that will prevent dower:" *Swanneck v. Lyford*, Co. Litt. 108, n. 1; *Banks v. Sutton*, 2 P. Wms. 790. In Virginia it is held that proof of the conveyance is not sufficient to show a fraud; there must be an actual fraud: *Gregory v. Winston*, 23 Gratt. 102.

⁴ *Babcock v. Babcock*, 53 How. Pr. 97; *Young v. Carter*, 10 Hun, 194; S. C. 1 Abb. N. C. 136; 50 How. Pr. 410; *Petty v. Petty*, 4 B. Mon. 215; S. C. 39 Am. Dec. 501; *Mills v. Von Voorhies*, 20 N. Y. 412; *Simar v. Canaday*, 53 N. Y. 298.

⁵ *Baker v. Chase*, 1 Hill, 482; *Gilson v. Hutchison*, 120 Mass. 27; *Youngs v. Carter*, *supra*; *Brown v. Bronson*, 35 Mich. 415; *Jiggitts v. Jiggitts*, 40 Miss. 718.

her lifetime, for he has, usually, a present interest in the rents and profits of her lands. And the same is true, usually, of her personal property.

516. PERSONAL PROPERTY OF HUSBAND.—There is considerable conflict upon the question of a fraudulent conveyance by the husband of his personal property, with the intent of defeating the claim of his wife at his death. A number of cases have already been cited which hold such a conveyance, made before the marriage, void; and there are also a number which hold that it is not void. Another line of cases even hold that a conveyance of such property by the husband made during coverture with the intent to defeat the contingent interest of the wife is not void, unless the transfer be a mere device or contrivance by which the husband, not parting with the absolute dominion over the property during his life, seeks to deprive his widow of her share of his personalty at his death.¹

517. MARRIED WOMEN'S ACTS.—It is always a matter of importance how far the recent married women's acts have changed the rule with respect to secret conveyances, such as we have been discussing. The terms of a particular statute of this kind must be closely scrutinized before a conclusion can be drawn. Usually these statutes do not deprive the husband of a contingent or inchoate interest in his wife's lands if he survive her; and, while they usually give her the right to the rents and profits

¹ *Dunnock v. Dunnock*, 3 Md. Ch. 140; *Hays v. Henry*, 1 Md. Ch. 337; *Cranston v. Cranston*, 4 Mich. 230; *Holmes v. Holmes*, 3 Paige, 363; *Richards v. Richards*, 11 Humph. 429; *Petty v. Petty*, 4 B. Mon. 215; S. C. 39 Amer. Dec. 501; *McGee v. McGee*, 4 Ired. L. 105; *Littleton v. Littleton*, 1 Dev. & B. 327; *Davis v. Davis*, 5 Mo. 183; *Stone v. Stone*, 18 Mo. 389; *Tucker v. Tucker*, 29 Mo. 350; S. C. 32 Mo. 464; (*contra*, *Cameron v. Cameron*, 10 Sm. & M. 394; *Lightfoot v. Colgin*, 5 Munf. 42); *Chandler v. Hollingsworth*, 3 Del. Ch. 99; S. C. 17 Amer. L. Reg. 319. (*Contra*, as to community property); *Smith v. Smith*, 12 Cal. 216; *Lord v. Hough*, 43 Cal. 581.

of her own land, they do not empower her to encumber or convey it without his consent. The possibility, therefore, of his acquiring an interest in her lands that will become of value may be a subject of some consideration when he enters upon a marriage treaty with her. Where a statute gives her the absolute control over her property, with the right to convey and dispose of it as she sees fit, without his concurrence, it would seem to logically follow that the husband could not object to a secret conveyance made by her on the eve of their marriage; for if she may, without his consent, convey or encumber the property openly, even though she be influenced by a desire to defeat any possibility of his obtaining an interest in her property if he should survive her, after the marriage, there is no reason why she may not make a valid and secret conveyance or encumbrance before their marriage. And so the same is true of her personal property, where she is the absolute owner after the marriage. At common law the husband was liable for his wife's debts contracted before their marriage, but these statutes usually release him, or hold him liable only to the amount of property he himself receives with her. If he receive nothing, then he is not liable. In all these instances, as we have said before, it would seem to logically follow that her secret conveyance is not fraudulent.¹ These views, however, have not met with the approval, apparently, of the Supreme Court of North Carolina; for it is there said, since the Constitution of 1868 was adopted in that State, that a husband was under an obligation to support his wife and her children by him, "and for that purpose is entitled to her services,

¹ This was the view of Mr. Justice Brewer in *Butler v. Butler*, 21 Kan. 521, though he does not decide the point; and that, too, even where the husband was entitled to one-half of the wife's property if he survived her, which she owned at her death; and *vice versa*. See, also, *Green v. Green*, 34 Kan. 740; and Chief Justice Horton's remarks in *State v. Walker*, 36 Kan. 297, 310, 311.

and to contribution from the profits of her estate. . . . The plaintiff was surprised by the fact that his wife had been induced to give away all the estate she owned, and to which he with reason looked for aid in supporting her. He was deceived, and the question is was he *defrauded* of any right to which he was entitled as husband. We think he was. The marriage act authorizes a wife to make contracts charging her real and personal estate for her necessary personal expenses, or for the support of her family. So the plaintiff had in legal contemplation a right to look to this lot as a source which would enable his wife to contribute to her necessary personal expenses, and for the support of the family, and was not only deceived, but was *defrauded* by the secret conveyance made the day before the marriage.”¹ So in Ohio a somewhat similar view was taken. A statute provided that “in any action against the husband and wife upon any case existing against her at their marriage, or upon any tort committed by her during coverture, or upon any contract made by her concerning her separate property . . . the separate property of the wife shall be also liable to be taken for any judgment rendered thereon.” Under this statute it was held that a secret conveyance by her of her property on the eve of her marriage was void as to creditors of both of them.² A similar result was reached in Virginia.³ In a Pennsylvania case it was said: “Nor does our married women’s act of 1848 at all affect the question. It prevents the marriage from operating as a transfer of any of the wife’s property to the husband, and saves it for herself. The plaintiff had, therefore, a right

¹ This case was, however, decided against the husband for the reason that he knew of the conveyance the day before the marriage: *Baker v. Jordan*, 73 N. C. 145.

² *Westerman v. Westerman*, 25 Ohio St. 500; *Alexander v. Morgan*, 31 Ohio 546.

³ *Powell v. Manson*, 22 Gratt. 177.

to suppose that he was marrying her with all her legal power over her estate ; whereas, by this arrangement, it was secretly slipped into the hands of trustees, and out of her control, just before the marriage was consummated. This is not just or equitable treatment of the husband. A fraud no greater than this would avoid any other contract than that of marriage ; but, as this cannot be avoided, equity avoids the contracts that are in fraud of it.”¹

¹ Duncan's Appeal, 43 Pa. St. 67. See *Freeman v. Hartman*, 45 Ill. 57.

CHAPTER XIX.

ORIGIN AND ESSENTIALS OF ADVANCEMENTS.

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518. LIMIT OF DISCUSSION.—The author in the discus-
sion of the subject of "Gifts" has excluded the subject of
Gifts by Will, and limited the consideration of the sub-
ject to Gifts *Inter Vivos* and *Mortis Causa*. In view of

this fact it has been thought best to exclude any discussion of the subject of Ademption, and limit the following pages to that of Advancement. The subject of Ademptions, while in many of its principles clearly connected with that of Advancements, and while the cases of ademptions, and illustrations used in them are often authority, and serve to illustrate cases of advancements, yet it is inherently connected with the subject of wills ; for in each and every instance of a controversy concerning ademptions a will is involved, while in advancements a question concerning wills seldom arises. Therefore, a practitioner, in his search for a discussion of the subject of Ademptions would almost invariably turn aside from a work bearing the title set on the title-page of this work, not expecting to find it discussed in this connection.

519. CONFUSION IN THE USE OF THE TERMS ADEPTION AND ADVANCEMENT.—Much confusion has arisen in the decided cases, and even in text-books, by the distinction between ademptions and advancements not being clearly borne in mind, and also by inaccurate distinctions, or no distinctions at all being observed as to the difference between these two terms and that of satisfaction. In many cases instances of ademption are spoken of, and often treated, as instances of advancements; and to add to the confusion the Legislature has more often than otherwise utterly failed to notice the distinction inherently existing between these two terms.

520. EARLY ENGLISH LAW OF PERSONAL EFFECTS OF DECEASED PERSONS.—In very early times of England the king, as *parens patriæ*, was entitled to take possession of the goods of an intestate, and he frequently delegated this

prerogative to the lords of manors and others, and they thus acquired what was afterward termed a proscriptive right to grant probate of wills, or administration of the effects of their suitors and tenants. Subsequently the king, except in these cases of proscriptive right, transferred this power or usage to the heads of the Church, who were thought to have more tender consciences than laymen, and to be better able to judge as to "what things would conduce to the benefit of the soul of the deceased." These "ordinaries," as they were termed, were accountable to no one, had unlimited power over the intestate's property, and they were held to a breach of confidence only when they failed to dispose of the proceeds of such property to pious uses—namely, for the good of the intestate's soul. Great abuses necessarily arose, and after giving to the wife and children their two-thirds, the reverend gentlemen often appropriated the remaining third to their own personal gratification, without even paying the debts of the deceased.¹ In 1285 Parliament passed an act declaring that the ordinary "from henceforth shall be bound to answer for the debts as far forth as the goods of the dead will extend," just as executors were under a will.² This statute simply had the effect to reduce the amount the ordinary would have otherwise received; for, having paid the deceased's debts, he kept what was left. Seventy years later the Parliament provided that "where a man dieth intestate, the ordinaries shall depute the next and most lawful friends of the dead person to administer his goods," who were to be accountable to the ordinaries, and to be in the

¹ 2 Black. Com. 494; 1 Wms. Exrs. 401; Graysbook v. Fox, Plowd. 277; Hensloe's Case, 9 Rep. 39 a.

² 13 Edw. I, c. 19; 2 Black. Com. 495; Palmer v. Allcock, 3 Mod. 59. It was decided, however, that this statute simply declared the rule at common law: Snelling's Case, 5 Co. Rep. 82 b. See, also, Hensloe's Case, 9 Co. Rep. 39 b; Snellings v. Norton, Cro. Eliz. 409, and Com. Dig. Administrator A.

same position as to suing and being sued as executors.¹ A subsequent statute provided that administration should be granted to the widow *or* next of kin of the intestate, or both, as the ordinary should think fit.² The result was that the administrator, instead of the ordinary, after the payment of the debts and paying the widow and the intestate's children their two-thirds, appropriated the remainder to his own personal satisfaction. But now as the ordinary was deprived of the power to appropriate the remnant of the estate to his own pious use, he was seized with a desire to prevent any one else except the widow and children from so doing, and exacted of the administrator a bond that he would faithfully account to such widow and children for the remainder left after paying the debts of the intestate; but the common-law courts adjudged these bonds void.³ These several statutes and unjust practices paved the way for the celebrated "Statute of Distribution,"⁴ discussed in the next section.

521. ENGLISH STATUTE OF DISTRIBUTION.—This statute is entitled "An Act for the better settling of intestates' estates," and is given in full in the Appendix. It authorized any officer having the power to grant letters of administration to exact a bond from the administrator, conditioned that he will make a faithful report of all property that may come into his hands, and will deliver

¹ "This," says Blackstone, "is the original of administrators, as they at present stand; who are only the officers of the ordinary, appointed by him in pursuance of this statute, which singles out the next and most lawful friend of the intestate; who is interpreted to be the next of blood that is under no legal disabilities:" 2 Black. Com. 496. The act referred to is 31 Ed. III, Stat. I, c. 11.

² 21 Hen. VIII, c. 5.

³ *Edwards v. Freeman*, 2 P. Wms. 441; *Hughes v. Hughes*, 1 Lev. 233; S. C. Carter, 125. See 2 Black. Com. 515.

⁴ 22 & 23 Car. II, c. 10.

and pay to such persons as the court or judge may decree "pursuant to the true intent and meaning of this act;" and directed the courts to "make just and equal distribution of what remaineth clear (after all debts, funeral and just expenses of every sort first allowed and deducted), amongst the wife and children, or children's children, if any such be, or otherwise to the next of kindred to the dead person in equal degree, or legally representing their stocks *pro suo cuique jure*, according to the laws in such cases, and the rules and limitations hereafter set down."¹ After providing that it shall not set aside the custom observed in the City of London or within the Province of York,² the statute provides that so much of the estate as remains after paying the debts, funeral expenses, and expenses of administration, the widow shall receive one-third part, "and all the residue" shall be divided "by equal portions, to and amongst the children of such persons dying intestate, and such persons as legally represent such children, in case any of the said children be then dead, other than such child or children (not being heirs-at-law) who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his lifetime, by portion or portions equal to the share which shall by such distribution be allotted to the other children to whom such distribution is to be made: and in case any child, other than the heir-at-law, who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his lifetime by portion not equal to the share which will be due to the other children by such distribution aforesaid; then so much of the surplusage of the estate of such intestate, to be distributed to such child or children as shall have any land

¹ Sects. 1, 2, and 3.

² Sect. 4.

by settlement from the intestate, or were advanced in the lifetime of the intestate, as shall make the estate of all the said children to be equal as near as can be estimated; but the heir-at law, notwithstanding any land that he shall have by descent or otherwise from the intestate, is to have an equal portion in the distribution with the rest of the children, without any consideration of the value of the land which he hath by descent, or otherwise from the intestate.”¹ The next section provided that if “there be no wife, then all the said estate to be distributed equally to and among the children; and in case there be no child, then to the next of kindred in equal degree of or unto the intestate, and their legal representatives as aforesaid, and in no other manner whatsoever.” It also provided that the distribution be postponed until one year after the intestate’s death, and then only on condition that the distributees give a bond to refund a sufficient sum to pay any of the debts of the intestate coming to light thereafter.²

522. RESEMBLANCE TO OLD ENGLISH AND TO ROMAN LAW.—This statute bears a somewhat near resemblance to the ancient English law, *de rationabili part bonarum*, so far as the equality of distribution is concerned, which has been claimed by some authorities to be unusually applicable to England,³ while others doubt if it was more than a custom peculiar to some localities.⁴ By that law a man’s goods were divided into three equal parts, one of

¹ Sect. 5.

² Sect. 7. This statute, after two extensions, was made perpetual by I Jac. 2, c. 17, f. 5. Of this statute it has been observed that two objects were in the view of the legislator, one that the residue shall be forthcoming, and the other that it shall be equally divided. By Bayley, B., in *The Archbishop of Canterbury v. Robertson*, 1 Cr. & M. 690, 705. Lord Hardwicke said that the statute was very inaccurately penned: *Stanley v. Stanley*, 1 Atk. 457.

³ Black. Com. 492.

⁴ Co. Litt. 176 b.

which went to his heirs, another to his wife, and the remaining third was at his own disposal. If he had no wife, one moiety went to his children, and the remaining moiety he could dispose of as he wished.¹ This statute also bears some resemblance to the Roman law of succession *ab intestatio*, and because the act was penned by an eminent civilian,² the notion at times has prevailed that Parliament copied it from the Roman Prætor. It is, however, but little more than a restoration, with some refinements and regulations, of the old constitutional English law which prevailed as an established right and custom from the time of Cnut downwards, many centuries before Justinian's laws were known or heard of in the western part of Europe.³

¹ 1 Wms. Exrs. 1, 2.

² Sir Walter Walker, see *R. v. Raines*, 1 Ld. Raym., p. 574, by Lord Holt.

³ 2 Bl. Com. 516. On the Roman succession *ab intestatio*, see Amos' Roman Civil Law, p. 305; Hunter's Roman Law, 559, and Justinian's Third Book.

"The idea of requiring children who had been advanced," said Osmond, J., in *Mitchell v. Mitchell*, 8 Ala. 414, "during the lifetime of their father, to bring the money or property thus received into hotchpot, when he died intestate, appears to have been obtained in England, from the custom of the city of London, and incorporated in the Statute of Distributions of 22 & 23 Charles II. The custom of London, which was referred to, is that which divided the freeman's personal estate into three parts, one of which, after his funeral expenses were paid, went to the widow, one to his children unadvanced by him, in his lifetime, and the other third, called the dead man's share, he might dispose of by will. And any of the children who had not been fully advanced in the lifetime of the parent, could bring the sum so received into hotchpot, share equally with the others in the orphanage part. . . . The question is, what constitutes an advancement? By the custom of London, it appears it was not every gift that constituted an advancement. It must be a marriage portion, or 'something to set up in the world with.' *Elliott v. Collier*, 3 Atk. 526. Presents by the father of small sums, unless expressly given by way of advancement, are not to be brought into hotchpot: *Morris v. Borrough*, 1 Atk. p. 403; *Elliott v. Collier*, 3 Atk. 526. Neither is money laid out in education or in traveling: *Pusey v. Desbouvrie*, 3 P. Wms. 315, in note. The custom was confined alone to personal property, and a gift of land though expressly intended as an advancement, would be so far to the orphanage share: *Cevill v. Rich*, 1 Vern. 181. The father could also, by an act in his life, give away any portion of his personal estate, to one of his children, provided he divested himself of all property in it; but if it is done *in extremis*, and could be

523. ENGLISH STATUTE OF DISTRIBUTION COMMON LAW IN AMERICA.—This statute was enacted sixty years after the first permanent settlement was made by the English in the present boundaries of the United States, and fifty years after the settlement at Plymouth. It may therefore be regarded, and it is in fact, common law in this country, and in force to-day except in so far as it has been modified by statutes local to the general States.¹ “When the American colonies were first settled by our ancestors it was held,” said the Georgia Supreme Court, “as well by the settlers, as by the judges and lawyers of England, that they brought hither as a birthright and inheritance so much of the common law as was applicable to their local situation, and change of circumstances.”² So it was ruled by the English Court of Chancery in 1722, “That if there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so, wherever they go, they carry their laws with them, and therefore such new-found country is to be governed by the laws of England; though after such country is inhabited by the English, acts of Parliament made in England, without naming the foreign plantations, will not bind them.”³ So Chancellor Kent has said: “The common law so far as it is applicable to

considered as a testamentary act, or if any power was reserved over the subject of the gift, it was considered a fraud upon the custom, as it regarded the other children: *Tomkyns v. Ladbroke*, 2 Ves. Sr. 591; *Elliott v. Collier*, 1 Ves. Sr. 15. This examination has been made of the custom of London, as it was the original of that portion of the English Statute of Distributions, requiring advancements to be brought into hotchpot, which was the prototype of ours, and is therefore proper to be considered as an aid, in coming to a correct conclusion, as to its true intent and meaning”

¹ Mr. Bishop in several of his works has discussed the subject of the common law in force in this country: 1 Bish. New Cr. L., sect. 190; Mar. & Div., sects. 116 to 125; First Book, sects. 43 to 59. See, also, 21 Amer. L. Reg. 523.

² *State v. Campbell*, T. U. P. Charlton, 166.

³ 2 P. Wms. 75.

our situation and government has been recognized and adopted as one entire system by the Constitutions of Massachusetts, New York, New Jersey, and Maryland. It has been assumed by the courts of justice or declared by statute, with like modifications, as the law of the land, in every State. It was imported by our colonial ancestors, as far as it was applicable, and was sanctioned by royal charter and colonial statute. It is also the established doctrine that English statutes passed before the emigration of our ancestors, and applicable to our situation, and in amendment of the law constitute a part of the common law of this country.”¹

524. EQUALITY BASIS OF STATUTE AND DECISIONS.—The primary object of this statute was to give each child of the intestate, with the exception of the “heir-at-law,” or eldest born male, an equal share or portion of the ancestor’s estate; to do equality among those having a moral right to his property. The courts have followed this statute, not only in its letter, but in its spirit, until it has been said that “Equality is equity amongst heirs, and the doctrine of advancement has, for its object, the furtherance of this end.”² In another case from the same State, it was said that “The maxim that equality is equity among heirs is a cardinal rule of distribution. In the absence of expressions clearly indicating a contrary intention, the courts will presume that the testator intended equality of distribution among his own children, in accordance with the settled policy of the law in this commonwealth. As between a loan, a gift and an advancement, the presumption is in favor of an advancement,

¹ 1 Kent. Com. 472. See, also, *Short v. Stotts*, 58 Ind. 29; *Sackett v. Sackett*, 8 Pick. 309; *Bruce v. Wood*, 1 Met. 54.

² *Miller’s Appeal*, 31 Pa. St. 337.

because of its tendency to equality.”¹ In considering whether a certain transaction between a parent and child is an advancement or not, the maxim of equality and that each and every child he has has an equal moral claim on his property at his death must always be borne in mind. Inequality is not to be presumed, nor favoritism nor preference for one child to the injury of another.²

¹ Patterson's Appeal, 128 Pa. St. 269, 280.

² Hepworth v. Hepworth, L. R. 11 Eq. 10; Edwards v. Freeman, 2 P. Wms. 435; Johnson v. Belden, 20 Conn. 322; White v. White, 3 Dana, 374. In speaking of a case of ademption, Vice-Chancellor Wigram said, and the statement is applicable to an advancement: “The language of the court in these cases is that it ‘leans against double portions’—a rule which though sometimes called technical, Lord Cottenham says was founded on good sense, and could not be disregarded without disappointing the intentions of the donors: Pym v. Lockyer, 5 Mylne & C. 29, 46. . . . The rule of presumption, as I before said, is against double portions, as between parent and child; and the reason is this: a parent makes a certain provision for his children by his will; if they attain twenty-one, or marry, or require to be settled in life, he afterward makes an advancement to a particular child. Looking to the ordinary dealings of mankind, the court concludes that the parent does not, when he makes that advancement, intend the will to remain in full force, and that he has satisfied in his lifetime the obligation which he would otherwise have discharged at his death; and having come to that conclusion, as the result of general experience, the court acts upon it and gives effect to the presumption that a double portion was not intended. If, on the other hand, there is no such relation, either natural or artificial, the gift proceeds from the mere bounty of the testator; and there is no reason within the knowledge of the court for cutting off anything which has in terms been given. The testator may give a certain sum by one instrument, and precisely the same sum by another: there is no reason why the court should assign any limit to that bounty which is wholly arbitrary. The court, as between strangers, treats several gifts as *prima facie* cumulative. The consequence is, as Lord Eldon observed, that a natural child, who is in law a stranger to the father, stands in a better situation than a legitimate child; for the advancement in the case of the natural child is not *prima facie* an ademption?” Suisse v. Lowther, 2 Hare, 424. The statement of Lord Eldon referred to occurs in *Ex parte Pye*, 18 Ves. 140, 147. “The Statute of Distribution does not break into any settlement that has been made by the father; it only meddles with what is left undisposed of by him, and of that only makes such a will for the intestate, as a father, free from the partiality of affections, would himself make; and this I may call a *Parliamentary Will*.” Edwards v. Freeman, 2 P. Wms. 435, 453, by Lord Chief Justice Raymond. Such is the rule in Louisiana: Benoit v. Benoit, 8 La. 228; Montgomery v. Chaney, 13 La. Ann. 207; Grandchamps v. Delpeuch, 7 Rob. (La.) 429.

525. DEFINITION OF ADVANCEMENT.—Turning to the English Statute of Distribution, we may say that an advancement is a provision made by a father in his lifetime on behalf of a child. A legacy or any other provision made by a will, consequently, is not an advancement, for the reason that such “legacy is not a provision secured by the parent in his lifetime.”¹ But the definition to be evolved from this statute is not broad enough to cover all the cases; for the courts have not stopped at a gift by a father, but have applied it to a gift made by the mother to her child. We may, therefore, define an advancement as follows: An advancement is a free and irrevocable gift by a parent in his lifetime to his child, or person standing in place of such child, on account of such child or person’s share of the donor’s estate which he will receive under the statute of descent if the parent or donor die intestate.² In a Maryland case it was said that “an advancement, in legal contemplation, is simply the giving,

¹ *Edwards v. Freeman*, 2 P. Wms. 435.

² The definition we have given is not broad enough to cover a gift by a husband to his wife, which the statutes in certain States require to be treated as an advancement. This will be treated of hereafter. We give a few judicial definitions of an advancement: “An advancement is a pure and irrevocable gift by a parent, in his lifetime, to his child, on account of such child’s share of the estate, after the parent’s decease:” *Miller’s Appeal*, 31 Pa. St. 337. See *Christy’s Appeal*, 1 Gr. Cas. (Pa.), p. 370. “An advancement is that which is given by a father to his child, or presumptive heir, by anticipation of what he might inherit:” *Nolan v. Bolton*, 25 Ga. 352. “The true notion of an advancement is a giving, by anticipation, the whole or a part of what it is supposed a child will be entitled to on the death of the parent or party making the advancement:” *Osgood v. Breed*, 17 Mass., p. 353. “The true idea of an advancement is a delivery by the parent during his life, to one or more of his children, the whole or a portion of that to which the child would be entitled on a distribution of the estate after the parent’s decease:” *Wheatherhead v. Field*, 26 Vt., p. 668. “An advancement is a payment or appropriation of money or property, or a settlement of real estate, made by a parent to or for a child, in advance or anticipation of the distributive share to which such child would be entitled after the death of the parent, and with a view to a portion or settlement in life:” *Holliday v. White*, 33 Tex., p. 460. “It is the giving by a parent to the child or heir, by way of anticipation, the whole or a part of what is supposed the donee will be entitled to on the death

by anticipation, the whole or part of what it is supposed the child or party advanced would be entitled to receive on the death of the party making the advancement ;" that "it does not involve the elements of legal obligation or future liability on the part of the party advanced, but is a pure and irrevocable gift, and must result from a complete act of the intestate in his lifetime, by which he divests himself of all property in the subject, though in some cases and under some circumstances it may not take effect in possession until after the intestate's death."¹

526. DIFFERS FROM "ADVANCES."—The word "advancement" does not cover the word or mean "advances." Thus it has been said that "the word 'advances,' when taken in its strict legal sense, does *not* mean gifts—*advanceneti*, and *does* mean a sort of loan; and when taken in its ordinary and usual sense, both loans and gifts—loans more readily perhaps, than gifts. Advances are said to take place when a factor or agent pays to his principal a sum of money, on the credit of goods belonging to

of the party making it:" *Wallace v. Reddick*, 119 Ill. 151, 156. See, also, *Darne v. Lloyd*, 82 Va. 859; *Grey v. Grey*, 22 Ala. 233; *Meadows v. Meadows*, 11 Ired. L. 148; *Kintz v. Friday*, 4 Dem. 540; *Grattan v. Grattan*, 18 Ill. 167; *Cawthon v. Coppedge*, 1 Swan. 486; *House v. Woodward*, 5 Coldw. 196; *Morris v. Morris*, 9 Heisk. 814; *Rains v. Hays*, 2 Tenn. Ch. 669; *Dillman v. Cox*, 23 Ind. 440; *Ruch v. Biery*, 110 Ind. 444; *Brook v. Latimer*, 44 Kan. 431; *Chase v. Ewing*, 51 Barb. 597; *Barker v. Comins*, 110 Mass. 477; *Fellows v. Little*, 46 N. H. 27; *Crosby v. Covington*, 24 Miss. 619. In Canada it is said that an advancement there differs from an advancement in England by statute. "Under our law an advancement is neither a loan or debt to be repaid, nor an absolute gift. It is a bestowment of property by a parent on a child on condition that, if the donee claims to share in the intestate estate of the donor, he shall bring in this property for the purposes of equal distribution:" Hall, *In re*, 14 Ontario, 557. This quotation is quite applicable to an advancement in many of our States, where similar statutes have been enacted.

¹ *Harley v. Harley*, 57 Md., p. 342. A conveyance by way of advancement, in good faith, is a *disposal of property* within the meaning of a covenant to renew a lease, if the lessor "should not dispose of" the premises during the term: *Elston v. Schilling*, 42 N. Y. 79.

the principal, which are placed, or are to be placed, in the possession of the factor or agent, in order to reimburse himself out of the proceeds of the sale.”¹ So in another case it was said that “‘Advances’ is not the appropriate term for money or property thus furnished,” referring to an advancement; “the latter phrase [advances] in legal parlance, has a different and far broader signification. It may characterize a loan or a gift, or money advanced, to be repaid conditionally. ‘Lent and advanced’ were the language of the old common count, in assumpsit, for money loaned or advanced to be repaid.”²

¹ *Nolan v. Bolton*, 25 Ga. 352.

² *Chase v. Ewing*, 51 Barb., p. 612. In this case the testator's will contained the following clause: “Whatever advances I have made to any of my children, or to the husbands of any of my children, for which any receipts or other evidences of indebtedness may be found among my papers after my decease, I hereby give and devise to my said children, to each one the advance made to each; my intention being by this that such receipt or other evidence of indebtedness shall not be collected or enforced against them, or either of them, who may have signed the same, but that the same be given up to that one of my children who may have in person, or whose husband may have signed the same, the receipt or other evidence as aforesaid of each to each.” It was held that the entire tenor and scope of this clause showed clearly that the testator had in view not gifts and advancements previously made as such, but “advances” only, in the nature of loans, and for which he held vouchers whereby the claims could be enforced.

So this term used in a will was held not to include moneys paid for maintenance of the testator's children: *Vail v. Vail*, 10 Barb. 69. See *Onslow v. Mitchell*, 8 Ves. 490. Use of in statute held to include the popular meaning of the word: *Orm-by v. State*, 6 Nev. 283. In *Nolan v. Bolton*, 25 Ga. 352, the testator declared that “it is my will and desire, that at the division of my property, each one” (legatee) “shall be charged with, and account for in said division, all money or property they have received from me, so as to make them share equally in the property to be divided, and in advances” It was held that the legatees were bound to account for all money “received” by them, as well as that received by them as a loan, or that received by them as an advancement. In *Barker v. Comins*, 110 Mass. 477, a testator gave by his will a certain sum to the children of his deceased son G., “which with the *advances* made to my son G., in his lifetime, will make them share equally with my other sons.” It was held that in considering the bearing of this provision upon the question of the testator's sanity, the word “advances” was not necessarily restricted to the meaning “advancements,” as used in the statutes, but might be taken to include any benefits which the testator might have reasonably considered an appropriation of the estate.

527. "ADVANCEMENT" DISTINGUISHED FROM A "GIFT" OR "DEBT."—Every advancement includes an irrevocable gift, but every gift does not include an advancement. "It is distinguishable from a gift," said the Supreme Court of Vermont, "which parents may make to their children, whether to a greater or less amount; for in such case there is no intention to have it chargeable on the child's share of the estate."¹ So, too, it is distinguishable from a debt; for in the case of an advancement the common relation of debtor and creditor does not exist.²

528. DISTINGUISHED FROM AN "ADEMPTION."—An ademption differs from an advancement in several things, the chief of which is that it must be connected with a will. Thus in an Indiana case it was said that "where one who has made his will, giving a legacy to a child or grandchildren, *afterward* [not before] gives a portion to or makes provision for the child, though without expressing it to be in lieu of the legacy, it will be deemed an exemption if the circumstances indicate that intention, if it is not less than the legacy, if it is certain, and of the same general nature."³ So, in New York, it was said that the term "is used to describe the act by which the testator pays to his legatee, in his lifetime, a general legacy which by his will he had proposed to give him at his death. It is also used to denote the act by which a specific legacy has become inoperative on account of the testator having parted with the subject."⁴ These definitions are broader than it is necessary for our purpose in this connection, for we desire to confine the term to those cases in which a benefit has been given by a prior will, and this benefit is

¹ *Weatherhead v. Field*, 26 Vt. 665.

² *Ib.*

³ *Clendenning v. Clymer*, 17 Ind. 155; *Weston v. Johnson*, 48 Ind. 1.

⁴ *Langdon v. Astor*, 16 N. Y. 1, 40.

afterward taken away or annulled by the testator's own act in conferring some other gift during his lifetime. Thus if a testator bequeaths a certain horse to his prospective donee, and before his death give him the horse, or give other property in lieu thereof, the legacy thus bestowed has been adeemed; the testator has, as it were, become his own executor or administrator, and delivered to the donee what such official would have been required by the terms of the will to deliver at the testator's decease. It is to be observed in this connection that the donee need not be a child or grandchild of the testator; it is sufficient if the latter bear the relation of *loco parentis* to the donee.¹

529. DIFFERENCE BETWEEN ADVANCEMENT AND SATISFACTION.—There is an advancement which is distinguishable from those already discussed as well as from an ademption, and which distinction is not always clearly borne in mind. It is that involved in the term "Satisfaction." Suppose a parent makes a settlement on his child on its marriage as a marriage settlement, or covenant in view of such marriage to pay him a certain sum of money when a child shall be born as a fruit of the marriage. There is no legal obligation resting upon him to make such a settlement or to enter into such a covenant; but having covenanted, at least, to pay a certain sum of money, a court of equity will enforce the covenant, viewing the marriage as at least a sufficient consideration to sustain it. If then the parent, in after life, make an ad-

¹*Strother v. Mitchell*, 80 Va. 149; *Hansbrough v. Hooe*, 12 Leigh, 316; *Monck v. Monck*, 1 B. & B. 298. As to the meaning of the term *loco parentis* see *Powys v. Mansfield*, 3 Mylne & Cr. 359; S. C. 6 Sim. 528; *Ex parte Pye*, 18 Ves. 140; *Wetherby v. Dixon*, 19 Ves. 407, 412; *Pollock v. Worrall*, L. R. 28 Ch. Div. 552; *Brinkerhoff v. Merselis*, 4 Zab. (N. J.) 680; *State v. Crossley*, 69 Ind. 203. The subject of ademption is usually divided into 1, Satisfaction of debts by legacies; 2, of legacies by subsequent legacies; 3, of legacies by portions and advancements; and 4, of portions by legacies.

vancement to the child, it is frequently a question whether the advancement was made in satisfaction of the covenant. Now, it is apparent at a glance, that a child, in the case of an ordinary advancement, where no such settlement has been made, has no option whether or not the gift shall be considered as an advancement; that is a question entirely optional with the donor. If it was his intention that the gift should be taken and deemed an advancement, and such intention is clearly shown, then it must be so taken and construed, however much the donee may object. But in the case of a covenant to make a marriage settlement the consent of the donee is essential; and unless he consent, the transaction cannot be taken as a satisfaction of the covenant. Here are two parties, both of which must agree how the transaction must be considered. Satisfaction is, therefore, to be understood as the cancellation of a prior legal obligation by the substitution, with the consent of both parties, of a performance other than that called for by the terms of the covenant or agreement. It differs from the case of an advancement purely, by the facts that there is no prior legal obligation nor any assent of the recipient of the gift essential.¹

530. REVOCATION OF AN ADVANCEMENT.—Every advancement is a perfected gift; and if the gift, for any reason, is not complete, it is not an advancement. It, therefore, results that without the consent of the donee the donor has no power to recall or revoke an advancement.²

¹ Lord Chichester *v.* Coventry, L. R. 2 H. L. 71; Tussaud's Estate, L. R. 9 Ch. Div. 363, 380; Wallace *v.* Du Bois, 65 Md. 153.

² O'Brien *v.* Shiel, L. R. 7 Ir. Eq. 255; Darne *v.* Lloyd, 82 Va. 859; Yancy *v.* Yancy, 5 Heisk. 353; High's Appeal, 21 Pa. St. 283; Largent *v.* Berry, 3 Jones L. 531; Marston *v.* Lord, 65 N. H. 4; Lisloff *v.* Hart, 25 Miss. 245; Gee *v.* Gee, 32 Miss. 190; Fatheree *v.* Fletcher, 31 Miss. 265; Slack *v.* Slack, 26 Miss. 287; Mallett *v.* Page, 8 Ind. 364; Patterson *v.* Mills, 69 Ia. 755; Miller's Will, 73 Ia. 118; Alleyne *v.* Alleyne, 8 Ir. Eq. 493; S. C. 2 Jon. & L. 644; Harley *v.* Harley, 57 Md., p. 342.

531. CHANGING GIFT TO ADVANCEMENT.—A gift vests the absolute title to the property in the donee, free from any and all control over it by the donor. It differs from an advancement chiefly in the fact that it cannot be brought to reduce the portion of the parent's estate that the donee child receives when his parent has died intestate. To permit the donor to change an absolute gift to an advancement without the consent of the donee would materially reduce the value of his prospective interest in his parent's estate. All the cases, therefore, declare that a gift cannot be changed to an advancement without the consent of the donee.¹ If the donor desires that an absolute gift be charged up against any portion the donee will receive at his death if he die intestate, the only way he can secure the accomplishment of his desire is to execute a will directing that the value of such gift shall be charged to the donee in the final distribution, and that his portion shall be reduced by that amount.² Therefore, subsequent declarations of the donor that he intended a transaction amounting to an absolute gift to be an advancement is not admissible to show that the gift was changed to an advancement.³ So where a father advanced to his son a "wool carder" of the value \$1,000, and afterward took possession of and used it, it was held that he became liable to the son for value of its use, and that the statute of limitations ran against the claim for such use just as it runs against any other claim. The claim for such use being barred before the father's death, the

¹ *Slack v. Slack*, 26 Miss. 287; *Hutman's Estate*, 30 Pitts. L. J. 385; *Lawson's Appeal*, 23 Pa. St. 85; *Wallace v. Owen*, 71 Ga. 544; *Harper v. Parks*, 63 Ga. 705; *Hall, In re*, 14 Ontario, 557.

² *Bradsher v. Cannady*, 76 N. C. 445.

³ *Frey v. Heydt*, 116 Pa. St. 601; *Heydt v. Frey*, 21 W. N. C. 265. As we shall hereafter see, subsequent declarations of the donor or intestate are not admissible for any purpose.

son could not insist that its value should not be deducted from the amount of his advancement.¹

532. CHANGING ADVANCEMENT TO GIFT.—Since the donee will be benefited by the changing of an advancement to a gift, the donor may make such a change without the consent of such donee.²

533. CHANGING DEBT TO AN ADVANCEMENT.—The donor and donee may mutually change a debt to an advancement, but inasmuch as every advancement is a perfected gift, and no gift is perfect unless the donee accept its provisions and benefits, therefore a debt cannot be changed to an advancement, and a gift thus be thrust upon the donee, unless he consent to such change.³

534. CHANGING ADVANCEMENT TO A DEBT.—An agreement to change an advancement to a debt is not

¹ The value of the advancement was \$1,000, the use \$300, and the son claimed he should be charged with only \$700 in his advancement. This claim was disallowed: *Persoll v. Scott*, 64 Ga. 767. As an advancement is perfect before the death of the donor, a delivery of the gift to the administrator of the donor is not binding on the donee and he may rightfully reclaim the gift: *Sayre v. Sayre*, 5 Stew. (N. J.) 61; S. C. 8 Stew. 563.

² *Wallace v. Owen*, 71 Ga. 544; *Needles v. Needles*, 7 Ohio St. 432. In *Harper v. Parks*, 63 Ga. 705. it is said that the change may be made by mutual consent of the donor and donee, but this is contrary to all the authorities, and probably a slip of the pen.

If a statute requires an advancement to be evidenced by certain written instruments, then the change of an advancement to a gift cannot be accomplished except by the destruction or changing of such instruments: *Wheeler v. Wheeler*, 47 Vt. 637.

³ *Dewee's Estate*, 3 Brewster, 314; S. C. 7 Phila. 498; *Kirby's Appeal*, 109 Pa. St. 41; *Darne v. Lloyd*, 82 Va. 859. But where it was attempted to turn a debt owed by the husband to his wife's father into an advancement, in order to set it off against the amount of a legacy given to the wife by the father in his will subsequently executed, it was held that the declarations of the father made after the debt was created were not admissible for that purpose: *Kreider v. Boyer*, 10 Watts, 54.

The forgiving of interest due on a note is an advancement: *Leblanc v. Bertrant*, 16 La. Ann. 294.

binding on the donee, unless there is a consideration for the agreement making the change.¹

535. *ASSENT OF DONEE TO AN ADVANCEMENT.*—A donee is not compelled to accept an advancement any more than he is compelled to accept a gift; but if he accept the benefit of an advancement he cannot insist that he accepted it as a gift and not as an advancement. He must take the gift upon such terms as the donor sees fit to attach to it and not otherwise. The donor has the absolute right of disposal, which includes the right to impose just such terms, however onerous, as he sees fit, and the donee cannot dictate to him how he shall offer or bestow the property.²

536. *DONEE REFUSING TO ACCEPT ADVANCEMENT.*—Suppose the donee refuse to accept the advancement, and the donor, still insisting that he must accept it as such, dies; what effect will this have upon the portion the donee will receive from the donor's estate? The solution of this question lies in one of the essentials of a valid gift, which is that no gift is valid unless the donee accept it.

¹ *Higham v. Vanosdol*, 125 Ind. 74; *Harris v. Harris*, 69 Ind. 181. If the advancement is complete, no memorandum that the donor may subsequently execute can be used to show that the transaction was not an advancement or gift: *O'Brien v. Shiel*, L. R. 7 Ir. Eq. 255.

² See *Burbech v. Spollen*, 10 Amer. Rec. 491; *Nesmith v. Dinsmore*, 17 N. H. 515 (by statute assent not necessary). If the donee receive the proceeds and enjoy it, or even if he does not enjoy it, as where the advancement consists of the notes of a third party which are never collected by reason of the insolvency of the maker, he is bound: *Alleman v. Manning*, 44 Mo. App. 4. In the case of a married woman who cannot assent, or who insists that the advancement was a contract and not a gift, and repudiates the contract, she will be bound to account for the proceeds thus received, as an advancement: *Bucknor's Estate*, 7 Pa. C. C. 361. Under the Georgia code the donee's assent must be given: *Holliday v. Wingfield*, 59 Ga. 206; *Wallace v. Oven*, 71 Ga. 541. In the case of an *ademption*, the consent of the donee that the legacy should be adeemed is not necessary: *Crowles v. Crowle*-, 56 Conn. 240; *Chapman v. Allen*, 56 Conn. 152; *Richards v. Humphreys*, 15 Pick 133, merely accepting the gift making the *ademption*.

As every advancement is a valid gift, then there can be no valid advancement unless the donee accept it. Of course, as was said in the previous section, if the donee accept the benefit of the advancement he cannot afterward insist that it was a gift and not an advancement. If the donor desires that the proposed gift thus tendered as an advancement shall be deducted from the portion the donee will inherit from him, he can circumvent the obstinacy of the donee in refusing to accept, by the execution of a will, providing therein that the tendered gift or its value shall be deducted from the value of the property thus tendered, or he can equalize the beneficiaries under the will by giving to the donee an amount decreased to the extent of the tendered gift.

537. INTENTION OF DONOR CONTROLS.—The intention of the donor whether or not a certain gift is to be considered as an advancement is always material and the controlling one, aside from any statute, in the case.¹ The intention that the gift shall be an advancement must exist at the time it is made, and an intent that it shall be an advancement formed after the gift is perfected is unavailing, unless the donee consent that it shall be so taken and understood.² This intention is one of fact to be gathered from what was said and done at the time of the gift, from the subsequent statements of the donee when against his interest and offered by the party claiming the transaction was an advancement and not a gift, from the kinship of the donor to the donee, from his affection for him, from their intimacy, from his confidence in him, from a con-

¹ *Lee v. Boak*, 11 Grat. 182; *Williams v. Williams*, 15 Lea. 438; *Steele v. Friereson*, 85 Tenn. 430; *Roberts v. Coleman*, 16 S. E. Rep. 482; *Mason v. Holman*, 10 Lea. 315; *Fels v. Fels*, 1 Ohio C. C. 420; *Lyon's Estate*, 70 Ia. 375; *Holliday v. Wingfield*, 59 Ga. 206; *Groom v. Thomson*, 13 Ky. L. Rep. 223; *Morgan, In re*, 104 N. Y. 74; *Meeker v. Meeker*, 16 Conn. 383.

² *Rains v. Hays*, 2 Tenn. Ch., p. 674; *Aden v. Aden*, 16 Lea. 453; *Yancey v. Yancey*, 5 Heisk. 353; *Bradsher v. Connady*, 76 N. C. 445; *Melvin v. Bullard*, 82 N. C. 33.

sideration of the financial condition of the donee at the time of the gift, and from the amount of the gift as compared with the donor's remaining property. In other words, from what was said and done at the time of the gift, and as the lawyers and judges inartistically and tautologically say, "from all the surrounding circumstances."¹ The usual statute does not preclude an inquiry into the donor's intention. Thus where a statute provided that "any estate, real or personal, that may have been given by any deceased person in his lifetime, as an advancement to any child, shall be taken by such child, toward his share of the estate of the deceased," and another statute declared that "if any child shall have been advanced by the deceased, by settlement or portion of real or personal estate, the value thereof shall be reckoned;" it was decided that these statutes did not prevent either party from showing the donor's intention when he made the gift.²

538. STATUTE CHANGING RULE AS TO INTENTION.—Statutes have occasionally been passed that prevent the showing of the intention of the donor to constitute the transaction an advancement. Thus in Kentucky it is provided that "any real or personal property or money, given or devised by a parent or grandparent to a descendant, shall be charged to the descendant, or those claiming through him, in the division and distribution of the undevise estate of the parent or grandparent, and such party shall receive nothing further therefrom, until the other de-

¹ *Homiller's Estate*, 17 Phila. 513; S. C. 42 Leg. Int. 488; 17 W. N. C. 238; *Dilley v. Love*, 61 Md. 603; *Wallace v. Reddick*, 119 Ill. 151; *Williams v. Williams*, 15 Lea. 438; *Steele v. Frierson*, 85 Tenn. 430; *Mason v. Holman*, 10 Lea. 315; *Darden v. Harrill*, 10 Lea. 421; *Merkel's Appeal*, 89 Pa. St. 340; *Alexander v. Alexander*, 1 N. Y. St. Rep. 508; *Speer v. Speer*, 1 McCart. 240; *Murless v. Franklin*, 1 Swanst. 13; *Jeans v. Cook*, 24 Beav. 513; S. C. 4 Jur. N. S. 57; 27 L. J. Ch. 202.

² *Shaw v. Kent*, 11 Ind. 80; *Dillman v. Cox*, 23 Ind. 440; *Wolfe v. Kable*, 107 Ind. 565; *Dille v. Webb*, 61 Ind. 85.

scendants are made proportionately equal with him, according to his descendible and distributable share of the whole estate, real and personal, devised and undevised.”¹ Under this statute the intention of the donor “is never consulted, the cardinal object of the statute being to make those entitled equal in the distribution of the estate.”² In Vermont a statute provided, in substance, that if any sum has been advanced by the intestate, the advancement shall be reckoned to the share of the donee, “and that any personal estate, delivered to such heir, whereof a charge or memorandum in writing is made by such intestate,” shall be deemed and taken an advancement to such heir. Under this statute it was held that it was not admissible to show the intention of the donor, except in so far as it could be gathered from the “charge or memorandum in writing.”³

Gen. Stat., chap. 31, sect. 15; Acts 1851, p. 342.

¹ *Bowles v. Winchester*, 13 Bush. 1; *Phillups v. Phillips*, 20 S. W. Rep. 541; *Cleaver v. Kirk*, 3 Met. 270; *Shawhan v. Shawhan*, 10 Bush. 600; *Stevenson v. Martin*, 11 Bush. 485. Perhaps the statement in the text is a little strong. It may be put that the intention must control in determining whether or not the transaction is a gift or advancement; but it matters not whether it be one or the other, if the donee desire to participate in the distribution of the donor's estate he must account for and bring into “hotchpot” the gift or advancement, regardless of its name, thus received. This seems to be the view in South Carolina under a similar statute, the court saying: “Then it is said that the intestate did not intend that her son should account for the bond as an advancement. This can hardly be said to be a question of intention. A father may give his son half his estate and declare, by the most formal instrument, that he does not intend it as an advancement; but, if he afterward die intestate, the law precludes such a son from any share in the inheritance, unless he bring such previous gift into hotchpot. What is, or is not, an advancement may depend on circumstances, as in *Murrel v. Murrel*, 2 Strobb. Eq. 148; *Cooner v. May*, 3 Ib. 185; and *Ison v. Ison*, 5 Rich. Eq. 15; but the mere declarations of the donor cannot alter the operation of the law either as to the character of the gift or even the mode of valuation.” *Rees v. Rees*, 11 Rich. Eq. 86.

² *Weatherfield v. Field*, 26 Vt. 665. See, also, *Newell v. Newell*, 13 Vt., p. 22; *Brown v. Brown*, 16 Vt., p. 203; and *Adams v. Adams*, 22 Vt., p. 69, modifying *Newell v. Newell*. A similar statute and rule existed in Massachusetts: *Quarles v. Quarles*, 4 Mass. 680; *Barton v. Rice*, 22 Pick. 508; *Ashley, Ex parte*, 4 Pick. 21.

539. *RELATION OF DONOR TO DONEE.*—The donor must stand in such blood relation to the donee that the latter inherits a part of the former's estate if he were to die intestate; if he inherits all of the intestate's property, then no question of advancement can arise, because there can be no distribution. Usually this is a relationship of father or mother to son or daughter. In such instances the law presumes that the donor intended to make an equal and just division of his estate.¹ Any one inheriting from the donor through the donee is bound by the advancement made to the latter, and the person so inheriting from such donee stands exactly in the same position as the donee would stand if he were alive.²

540. *GIFT TO GRANDCHILDREN.*—Compelling a child to stand in the shoes of a parent who has been advanced is a very different thing from compelling a grandchild, who has received a part of his grandfather's estate, and who will inherit more at his death if his ancestor dies intestate, to account for such part or portion as an advancement. A careful reading of the 5th section of the English Statute of Distributions will show that only a child must account for an advancement, and the grandchildren only when their parent has been advanced. Nothing is said about advancing a grandchild. In an early case it appeared that a grandfather took bonds in the name of his grandchildren, who were infants, their father being

¹ *Holliday v. Wingfield*, 59 Ga. 206; *Wallace v. Reddick*, 119 Ill. 151; *McMahill v. McMahill*, 69 Ia. 115; *Burton v. Baldwin*, 61 Ia. 283; *Hodgson v. Macy*, 8 Ind. 121; *Dillman v. Cox*, 23 Ind. 440; *Higham v. Vanosdel*, 125 Ind. 74; *Stanley v. Brannon*, 6 Blackf. 193; *Scott v. Harris*, 127 Ind. 520; *State v. Jameson*, 3 G. & J. 442; *Hall v. Hall*, 107 Mo. 101; *Parker v. Newitt*, 18 Ore. 274; *Taylor v. Muller*, 19 Ore. 550; *Lewis's Appeal*, 127 Pa. St. 127.

² *West v. Bolton*, 23 Ga. 531; *Bransford v. Bransford*, 51 Ga. 23; *McLure v. Steele*, 14 Rich. Eq. 105; *Rees v. Rees*, 11 Rich. Eq. 86; *Dupuy v. Dupont*, 11 La. Ann. 226.

dead. In passing upon the question the Chancellor said: "There is a difference in the case where the father is dead and where he is alive; for when the father is dead, the grandchildren are in the immediate care of the grandfather, and if he take bonds in their names, or make leases to them, it shall not be judged trusts [as it would be if they were strangers], but provision for the grandchild, unless it be otherwise declared at the same time; and decreed accordingly, on that reason, though there were other matters."¹ This is unsatisfactory. In another old authority it is said that "if a grandfather takes bonds in the name of his grandchildren, the father being dead, this shall be an advancement for the grandchildren, and not a trust for the grandfather; for the father being dead, the children are under the immediate care of the grandfather."² In Pennsylvania the statute concerning ad-

¹ Ebrand v. Dancer, 2 Ch. Cas. 26, and see same case in note to Currant v. Jago, 1 Coll., p. 261. This decision was rendered in 1680, ten years after the Statutes of Distributions was enacted.

In 1719 a case arose where a grandmother bought an annuity for £100 in her grandchild's name. The child's father gave the grandmother a bond to repay the £100 if the child died before the grandmother, who received the income and kept the annuity tally or bond, the grandchild making no claim to it. It was held that the grandchild was not entitled to the proceeds of the tally: Loyd v. Read, 1 P. Wms. 607.

Where by the custom of a manor copyholds were held for lives successive (the legal tenancy being in the *cestui que vie*), the insertion, by the beneficial owner of such copyholds, of the name of the illegitimate son of his daughter as *cestui que vie* thereof, was held not to be of itself sufficient to raise a presumption that such copyholds were intended to be given to such grandchild by way of advancement, although it and his mother were at the time of the transaction inmates of the grandfather's house and maintained him, and although it continued to be so maintained after the marriage of its parents, which took place shortly after the said transaction: Tucker v. Burrow, 2 H. & M. 515. A few cases on supplying a surrender of copyhold for grandchildren are inserted, though they throw little light on the subject: Perry v. Whitehead, 6 Ves. 544; Hills v. Downton, 5 Ves. 557; Kettle v. Townend, 1 Salk. 187; Chapman v. Gibson, 3 Bro. C. C. 229; Walts v. Bullas, 1 P. Wms. 69; Fursaker v. Robinson, Pre. Ch. 475; S. C. 1 Eq. Cas. Abr. 123, pl. 9; Hill v. Hill, 3 Ves. & B. 183.

² 1 Eq. Cas. Abr. 382, pl. 11. The case relied upon is Ebrand v. Dancer, *supra*.

vancements is almost identical with the 5th section of the English Statute of Distributions, and the question arose whether a grandchild advanced after its father's death, by its grandparent, was chargeable with such advancement on the death of such grandparent. The court held that he was liable to be charged, construing the word "child" to mean "grandchild" as well as child. "The clear intent and design of the statutes are to equalize the property of the intestate among his children. Where one of his several children has died during his life, leaving an only child, who the intestate had advanced after the death of his father, it seems to us the whole reason of the statute compels us to hold it an advancement. To do otherwise would work injustice to the surviving children and defeat that equal distribution which the statute was designed to secure."¹ Under the New York statute a grandchild advanced by its grandparent after the death of its parent is chargeable with such advancement; and it may insist that a child of the grandparent advanced after the death of its father be charged with such advancement in the distribution of the grandparent's estate.² A statute of North Carolina provided that "in case any one of the children [of an intestate] shall have been advanced in personal estate of greater value than an equal share thereof which shall have come to the other children, he or his legal representative shall be charged in the division of the real estate, if there be any, with the excess in value, which he may have received as aforesaid, over and above an equal distributive share of the per-

¹ *Eshleman's Appeal*, 74 Pa. St. 42; reversing 1 Leg. Chron. 99; *Storey's Appeal* 83 Pa. St. 89.

² *Beebe v. Estabrook*, 79 N. Y. 246; S. C. 11 Hun, 523. The court calls attention to *Smith v. Smith*, 5 Ves. 721, where a contra opinion is intimated. So in Louisiana: *Webb v. Goodby*, 12 Rob. 539; *Mason v. Mason*, 12 La. 589; *Destrehan v. Destrehan*, 4 N. S. (La.) 557; *Succession of Tournillon*, 15 La. Ann. 263.

sonal estate.”¹ It was held that the grandchildren were compelled to account for all property advanced by their grandparent to their own parent, but were not compelled to account for or bring into hotchpot property given them directly by their grandparent after their parent’s death; the court holding that the statute was “restricted to gifts from a parent to a child,” and did “not include donations to grandchildren.”² In Kentucky a statute provided that “any real or personal property or money given or devised to a descendant shall be charged to the descendant or those claiming through him in the division and distribution of the undivided estate of the parent or grandparent, and such party shall receive nothing farther therefrom until the other descendants are made proportionately equal with him, according to his descendible and distributable share of the whole estate, real and personal, devised and undevised.”³ It was claimed that a gift made by a grandparent to his grandchild, while the parents of such child were living, must be construed as an advancement when the child’s parents died before the decease of the grandfather; but the court held that such was not the case. “Gifts to grandchildren,” said the court, “made whilst their parent, the immediate descendant of the party making the gifts, is alive, will not be converted into advancements to such grandchildren by the subsequent death of the parent during the lifetime of the grandparent. Such gifts are mere gratuities at the time they are made, and chargeable neither to the grandchildren nor their parents, and subsequent events cannot and do not change their legal character, and none of the grandchildren of the intestate can be properly charged with gifts made by him under the circumstances.” In this same case

¹ Rev. Code, 1854, p. 249, sect. 1, rule 2.

² *Headen v. Headen*, 7 Ired. Eq. 159; *Shiver v. Brock*, 2 Jones Eq. 137; *Daves v. Haywood*, 1 Jones Eq. 253; *Arrington v. Dortch*, 77 N. C. 367.

³ R. S., chap. 30, sect. 17.

the grandfather had conveyed land to his son-in-law after his daughter's death, and it was sought to charge the grandchildren with this real estate as an advancement. The court admitted that the conveyances, if made to the son-in-law during the life of the daughter (their mother) would have operated as an advancement, but held that having been made after her death they could not be charged with it as an advancement.¹

541. **ADVANCEMENT TO PARENT WHEN GRANDPARENT LEAVES SURVIVING HIM ONLY GRANDCHILDREN.**—Where the statute provided that if the intestate left only grandchildren they should inherit equally from him, and a statute provided that “advancements in real or personal property shall be charged against the child or descendants of the child to whom the advancement is made, in the division or distribution of the estate,” it was decided that the statute quoted had no application to an instance where a grandparent left surviving him only grandchildren, although he had advanced the parent of one of such grandchildren, and that such grandchildren took equal portions without any reference to any advancement that had been made to their parents.² This was put upon the ground that the grandchildren inherited directly from their grandparent and not through their parents.³

542. **PAYMENT TO SON-IN-LAW AS AN ADVANCEMENT TO DAUGHTER.**—Owing to the fact that a husband formerly had the right to all the personal property possessed by his wife at their marriage, and to the rents and profits of her real estate, and also to all personal property acquired by her during their marriage as well as to the rents and profits of real estate acquired by her

¹ *Stevenson v. Martin*, 11 Bush, 485.

² *Brown v. Taylor*, 62 Ind. 295.

³ A similar decision was reached in Pennsylvania: *Person's Appeal*, 74 Pa. St. 121; *Storey's Appeal*, 83 Pa. St. 89.

during that period, it became a rule of presumption acted upon by the courts that the giving of property by a father to his son-in-law as an advancement to the son-in-law's wife would be considered an advancement to her. In a Kentucky case the rule was well stated: "A gift of money or other personal property to the husband of the donor's daughter would," said the court, "if not otherwise intended, be an advancement to such daughter, though the husband, by wasting or losing it, might prevent his wife from deriving any benefit from it. So land given in *frank-marriage* to the husband and wife and to the survivor of them and their issue in tail—the wife being the daughter of the giver—would be an advancement to her to the full extent of the value of the entire estate, although the husband might survive her, and might also dock the entail, and thereby monopolize the whole estate; yet, in distributing her intestate father's estate, her children would be charged with the value of the estate thus enjoyed and converted by her father, because their grandfather so intended and provided, and because the object of the statute was to distribute his estate as he himself would have done or may be presumed to have intended. Nor could we doubt that a conveyance of the land to the husband of the conveyor's daughter in consideration only of his being her husband should be considered an advancement to her, just as much as if the conveyance had been to herself alone, or to her and her husband as tenants by the entirety."¹ This was said in a case where the father had orally promised his son-in-law to convey land to him as an advancement to his wife, the donor's daughter, and had put him in possession of the land in furtherance of the promise. The conveyance was not executed until after her death; yet it was held to be an advancement to her,

¹ Barber v. Taylor, 9 Dana, 84.

binding on her children, though their father got the full benefit of the advancement. "The doctrine of the decisions is," said the court in a later case, "that the intention of the donor to advance his daughter will be presumed from the fact that he conveys to her husband upon the sole consideration of the existence of the marriage relation between them."¹ Thus where the son-in-law borrowed of his wife's father certain sums of money, and gave his notes; and afterward the payee delivered them up to his son-in-law, forgiving their obligation as an advancement to his daughter, it was held that it was a valid advancement to her.² In all these cases the presumption may be rebutted.³ In the cases cited the consent or acquiescence of the daughter was not deemed essential; but the modern cases require her consent, which may arise out of a mere acquiescence. The person claiming that the gift was an advancement must show that she knew of it and either expressly consented thereto or acquiesced therein. This acquiescence may be inferred from facts and circumstances inconsistent with a lack of such knowledge and assent.⁴ So if a father-in-

¹ *Stevenson v. Martin*, 11 Bush. 485; *Stewart v. Pattison*, 8 Gill (Md.), 46; *Bridgers v. Hutchins*, 11 Ired. L. 68; *Wilson v. Wilson*, 18 Ala. 176; *Baker v. Leathers*, 3 Ind. 558; *McDearman v. Hodnett*, 83 Va. 281; *Towles v. Roundtree*, 10 Fla. 299; *Bruce v. Slemph*, 82 Va. 352; *Wanmaker v. VanBuskirk*, 1 N. J. Eq. 685; S. C. 23 Am. Dec. 748; *Lindsay v. Platt*, 9 Fla. 150 (forgiving husband's debt to intestate); *Dilley v. Love*, 61 Md. 603, 612; *James v. James*, 41 Ark. 301; *Pecquet v. Pecquet*, 17 La. Ann. 204 229.

² *Bridgers v. Hutchins*, 11 Ired. L. 68. If a father is indebted to a son-in-law and delivers to him property, it will be presumed that it was in payment of the debt and not an advancement to the daughter: *Haglar v. McCombs*, 66 N. C. 345. In North Carolina a gift of slaves to a daughter as an advancement was binding on her, though her husband took possession of them and retained them until her death. On her death they became his property: *Hinton v. Hinton*, 1 Dev. & Bat. Eq. 587; *Harrington v. Moore*, 3 Jones L. 56. When the wife dies before the donor, yet it is still an advancement: *Towles v. Roundtree*, 10 Fla. 299.

³ *Needles v. Needles*, 7 Ohio St. 432.

⁴ *Ditoe v. Cluney*, 22 Ohio St. 436; *Oakey's Estate*, 1 Bradf. 281; *Stump v. Stump*, 26 Ohio St. 169.

law takes his son-in-law's note, the presumption is that the transaction is a loan and not an advancement to his wife.¹ So merely showing a conveyance of real estate by the father-in-law to the son-in-law is not sufficient to raise the presumption of an advancement to the donor's daughter;² nor is the wife chargeable with money paid by her deceased father as the surety of her husband, as an advancement,³ unless something else is shown.⁴ This is undoubtedly the better rule, and especially in case of a gift of real estate. Speaking of the difference between an advancement of personal and real property, the Supreme Court of North Carolina said: "If personal property be given to a wife, it instantly, *jure mariti*, belongs to the husband; so it is immaterial whether the gift be made to the wife or to the husband. But if land be given to the wife, it remains hers, and the husband can only become entitled to a life estate as tenant by the curtesy; whereas, if it be conveyed to the husband, the wife takes nothing, save a collateral right to have dower in case she survives; so it cannot be said in any sense that she has received of

¹ *West v. Bolton*, 23 Ga. 531.

² *Rains v. Hays*, 6 Lea. 303.

³ *Rains v. Hays*, *supra*.

⁴ *Rains v. Hays*, 2 Tenn. Ch. 669. Where a father conveyed to his son-in-law a tract of land in consideration of the payment of \$17,000; and afterward, with her consent, released \$5,000 as an advancement to her; and then the son-in-law resold the land to the father-in-law for \$18,000, and died; it was held that the wife could not recover of his administrator the \$5,000 advancement: *Stumph v. Stumph*, 26 Ohio St. 169. So where D, the husband of S, received from W, the father of S, money and property as advancements for S, as her share of the estate of W, D was held to hold the same for S; and, upon the death of W, when the amount of her distributive share was ascertained and ready for payment, S had a right to compel D to account for and pay to her such money and property, or she might demand and collect her share in full from W's administrator: and in such a case, S having elected to sue the administrator, and having compelled him to pay her the distributive share in full, including the amount of such advancements, by operation of law, was subrogated to the rights and remedies of S against D as to such advancement: *Stayner v. Bower*, 42 Ohio St. 314.

her father any land by way of advancement."¹ In view of the recent married woman's property statutes, which enable her to hold and control property as distinctively as her own as if she were unmarried, and which she of her own free will may dispose of, except in the case of real estate, without her husband's consent, it may well be doubted if a gift to her husband can any longer be construed as an advancement to her, unless it is shown that she, before the gift was made, consented that it might be so made and thereafter charged up against any portion she might be entitled to receive from her parent's estate.²

¹ So it was held that a conveyance of land to a son-in-law is not to be reckoned as an advancement to the daughter, who, at the death of her father, was married to a second husband: *Banks v. Shannonhouse*, Phillips L. (N. C.) 284.

² But see *contra*, *Lindsay v. Platt*, 9 Fla. 150, and *Towles v. Roundtree*, 10 Fla. 299. Where a testator by his will created a fund and directed the trustee of it to pay over to each of his children a certain sum, but provided that "any legal debt due from either of said children to my estate at the time of my decease shall first be deducted by said trustee, and the balance only be paid over to such child as aforesaid;" and at the time the will was executed one of his daughters had executed with her husband notes to the amount of \$15,000 for money furnished him by the testator, but the testator had taken no notes from her for money advanced to her, and there were no other debts, either when the will was executed or at any time thereafter, due him from any of his children unless a similar note executed by another daughter was regarded as a debt—it was held that these notes could not be deducted from the amount due her, on the ground that it was an advancement; for the testator having declared that all "legal debts" should be deducted, and these notes not being "legal debts" as against her, they were not such as the will directed to be deducted: *Rogers v. Daniell*, 8 Allen, 343. In respect to gifts to the husband being advancements of the donor to his daughter, the wife of the husband, so far as the daughter is bound thereby, there is but little difference in principle between an ademption and an advancement. We, therefore, give a few cases of ademption. Thus, in *Ravenscroft v. Jones*, 32 Beav. 669; S. C. 4 De Gex, J. & S. 224, a father gave his daughter a legacy of £700. The daughter having become engaged thereafter, the father, on her marriage, gave her £100, and after the marriage gave her husband £400 in cash. The Master of the Rolls held that the £100 was a gift, and so was the £400. On appeal one judge coincided with this view, but expressly refused to put his decision as to the £400, upon the fact that it was paid to the son-in-law and not to the daughter; while another judge held that upon all the facts, even if it had been paid to the daughter, there was only a gift. A third judge held that it was an advancement. In *Booker v. Allen*, 2 Russ. & M. 270, a testator gave to a person to whom he stood

543. MOTHER'S GIFT TO CHILD AS AN ADVANCEMENT.

—The moral obligation resting upon a mother to make provision for her child, especially for her son, has always been regarded as weaker than that of a father; and especially is this true where the gift is of land. The English authorities are unquestionably to the point that mere proof of a conveyance to the child by a mother, or a purchase by the mother in the name of her child, will not raise a presumption of an advancement or a gift; but very slight additional evidence that it was to be so con-

in loco parentis £4,000, the income of which was to be paid to her separate use, and on her death the principal to be divided among her children. On her marriage the testator executed a marriage settlement, giving £4,000 to trustees, the income of which was to be paid her husband for life, then on his death to his wife for life, and on her death the principal to go to their children. This settlement was accompanied by a verbal declaration of the testator that it was intended by him in lieu of the legacy; and it was so held. A similar case is *Carver v. Bowles*, 2 Russ. & M. 301. In *Kirk v. Eddowes*, 3 Hare, 509, a father had given by will £3,000 to his daughter for her separate use, with a remainder to her children. On her subsequent marriage and after the execution of the will, he gave to his daughter and her husband a promissory note of a third person, then due the testator, for £500. The wife had requested her father to give her husband the sum, and he did, declaring at the time that it was in part satisfaction of the legacy; and it was so held. In *Ferris v. Goodburn*, 27 L. J. N. S. 574, a father bequeathed his unmarried daughter a legacy. She then married, and he subsequently gave to her husband £800, in different sums, to be used by him in his business. This gift or payment was made at the husband's request, and it was not shown that it was to be applied on the legacy; but it was held that this was an ademption of the legacy *pro tanto*. "There was no reason," said the court, "for giving money to Ferris [the husband] except that he had married the testator's daughter; and, connecting these gifts with the marriage and the request made by the husband, it is impossible to say that the presumption of satisfaction is not raised or that parol evidence is not admissible, and, there being no evidence to rebut the presumption, there must be a declaration that the legacy was adeemed to the extent of £800." In *Nevin v. Drysdale*, L. R. 4 Eq. 517, a father gave by will to his daughter £500 in case she should marry. She then married, and two months after the marriage the father gave the husband £400 for furnishing a house, and promised a further sum of £600, which he never paid, dying soon after the promise. It was held that the legacy to the daughter was adeemed *pro tanto*. If payment be made to the husband before the execution of the will, there is no satisfaction or ademption of the legacy: *Lyon's Est*, 70 Ia. 375. On general subject, see *Paine v. Parsons*, 14 Pick. 318.

sidered will turn the scale in favor of the claim that the transaction is a gift or advancement.¹

544. GIFT TO STRANGER.—The father cannot by a gift to a stranger make it an advancement to his own child.² The law requires the gift to be made to the person who would inherit from the donor if he die intestate.³ But if the child agree at the time the gift is made that it may be so made, and the gift shall be deducted from any amount he in the future may inherit from the donor, then he will be bound thereby, and it will be, in effect, an advancement to him.⁴

545. GIFT MUST BE OUT OF DONOR'S OWN PROPERTY.—To be a valid advancement it must be of the donor's own property, and not out of property over which the donor may have the right of disposal or appointment. "There are certain essential elements," said the Supreme Court of South Carolina, "which every advancement must possess, one of which is that it must once have been a part of the ancestor's estate, which upon his death would descend to his heirs but for the fact that it has, by the act of the ancestor in making the gift, been separated from or

¹ *Re De Visme*, 2 De G., J. & Sm. 17; S. C. 33 L. J. Ch. 332; *Bennet v. Bennet*, 10 Ch. Div. 474; S. C. 27 W. R. 573; 40 L. T. N. S. 378; *Re Orme*, 50 L. T. N. S. 51; but see *Sayre v. Hughes*, 5 L. R. Eq. 376; S. C. 37 L. J. Ch. 401; 16 W. R. 662; 18 L. T. N. S. 347; *Batstone v. Salter*, 10 L. R. Ch. App. 431; *Watson v. Murray*, 54 Ark. 499. The rule does not apply to a step-mother: *Todd v. Moorhouse*, 19 L. R. Eq. 69; *Garrett v. Wilkinson*, 2 De G. & Sm. 244; *Re Orme*, 50 L. T. N. S. 51 (a widowed mother). In South Carolina it is held that the statute of distributions applies to a mother: *Rees v. Rees*, 11 Rich. Eq. 86. Can a married woman make an advancement? It would seem not: *Bucknor's Estate*, 7 Pa. C. C. 361.

² *Alleman v. Manning*, 44 Mo. App. 4.

³ *Rains v. Hays*, 2 Tenn. Ch. 669, 674; *Chase v. Box*, 1 Eq. Cas. Abr. 155; *Dupuy v. Dupont*, 11 La. Ann. 226; *Annand v. Honeywood*, 1 Eq. Cas. Abr. 153.

⁴ *Bridgers v. Hutchins*, 11 Ired. Eq. 63; *Dittoe v. Cluney*, 22 Ohio St. 436; *Barbor v. Taylor*, 9 Dana, 84; *Lindsay v. Platt*, 9 Fla. 150. See *Stevenson v. Martin*, 11 Bush. 485; *Shiver v. Brock*, 2 Jones Eq. 137.

taken out of his estate, or it must be something which is purchased with the funds of the father in the name of and for the benefit of the child.”¹

546. GIFT MUST BE PERFECTED IN LIFETIME OF DONOR—RENTS AND PROFITS OF REAL ESTATE.—Every advancement must be a perfected gift; and as a gift can only be made by the donor, it is clear that an advancement not perfected in his lifetime cannot be considered such after his death.² If the gift is void, then the donee must account to the donor's personal representative for all property received under it.³ The ancestor has no control over a perfect advancement, either during his lifetime,⁴ or by will after his death.⁵ But where the gift was of land, and void, and the donor afterward sold the land and gave half the purchase-money to the donee, the gift of the purchase-money was held to be an advancement to the amount paid, although the payment was made in Confederate currency.⁶ So where the gift was void, but the donee held and claimed the property given

¹ *Rickenbacker v. Zimmerman*, 10 S. C. 110; *Fennell v. Henry*, 70 Ala. 484; *Callender v. McCreary*, 4 How. (Miss.) 356. A woman executed an imperfect will giving to certain children her property. The will failed for want of execution, and the father of the children and his sister inherited the property. The father and living sister then executed a deed to the children, in order to carry out the intention of the dead sister. It was held that the property the father thus inherited and conveyed was not an advancement: *Hollister v. Attmore*, 5 Jones Eq. 373. A parent had power to distribute a fund among his children. He paid one of them a sum out of his own property equal to the child's share of the fund. It was held that this was not an apportionment of the fund: *Brownlow v. Meath*, 2 Ir. Eq. 383; S. C. Dr. & Wal. 674.

² *Fennell v. Henry*, 70 Ala. 484; *Joyce v. Hamilton*, 111 Ind. 163; *Neely v. Wood*, 10 Yerg. 485; *Herkimer v. McGregor*, 126 Ind. 247; *Yancy v. Yancy*, 5 Heisk. 353; *Crippen v. Bearden*, 5 Humph. 128; *Williams v. Mears*, 2 Dis. 604, 614; S. C. 4 West. L. Mag. 293; *Meadows v. Meadows*, 11 Ired. L. 148; *Crosby v. Covington*, 24 Miss. 619; *Phillips v. McLaughlin*, 26 Miss. 592.

³ *Shaw v. Shaw*, 6 Humph. 418.

⁴ *Phillips v. McLaughlin*, 26 Miss. 592.

⁵ *Black v. Whittall*, 1 Stock. (N. J.) 572.

⁶ *West v. Jones*, 85 Va. 616.

as his own, thus holding adversely to the donor, until his title thereto was perfected by the running of the statute of limitations, it was held that he must account for the property on advancement.¹ So where the gift of the land was void, but the donee went into possession and received the rents and profits thereof, such rents and profits thus received during the lifetime of the donor were charged against the donee as an advancement. It was also held in the same case that when the donor rented to the donee certain land, the rent to be paid by improvements to be made on the land; and the donee occupied the premises seven years and made improvements thereon worth \$2,500; and afterward the donor made a settlement with the donee and executed to him a receipt in full, the donee could not be charged with advancements, though it was shown that the rents were annually worth \$550 a year.²

547. DONOR MUST DIE INTESTATE.—To constitute a case of advancement the donor must have died intestate. Such is the language of the English Statute of Distributions. Where a will is made and then the gift, the question is one of *ademption*, and not advancement.³

¹ O'Neal v. Breecheen, 5 Baxt. 604. In Long v. Long, 118 Ill. 638, it was held that an advancement which is not evidenced in the manner required by the statute is, in legal effect, no advancement at all, however clearly it may appear it was so intended: Reversing 30 Ill. App. 559.

² Wakefield v. Gilleland, 18 S. W. Rep. 768; Robinson v. Robinson, 4 Humph. 392.

On the question of rents generally, see Shawhan v. Shawhan, 10 Bush. 600; Evans v. Evans, 1 Heisk. 577. See Ford v. Thompson, 1 Met. 580; Clarke v. Clarke, 17 B. Mon. 698; Montjoy v. Maginnis, 2 Duv. 186. In this last case the heirs of the donor refused to perfect the gift of real estate made by the parent, and the court declined to charge the donee with the rents and profits as an advancement.

The wife cannot make an advancement to a child of her husband's property when he is insane, though that was clearly his intention before his infirmity came upon him: Bailey v. Bailey, 6 Conn. 308.

³ Marshall v. Rench, 3 Del. Ch. 239, 254; Newell's Will, 1 Brown (Pa.), 311; McDougald v. King, 1 Bail. Ch. 154; Newman v. Wilbourne, 1 Hill Ch. 10; Rainsford v. Rainsford, Speer Eq. 385; Allen v. Allen, 13 S. C. 512.

548. PARTIAL INTESTACY.—The question whether the law of advancements applies to a case of partial intestacy is one of importance, and often depends upon the statutes in force at the place of distribution. In North Carolina the statute provided that advanced heirs should be charged with such advancements where the donor died “intestate;” and this was held to mean *wholly* intestate. In this case the testator bequeathed certain slaves, but before he died, and after he executed his will, these slaves had children, and this was held to render the statute with reference to distributions inapplicable.¹ Such is the rule under the English Statute of Distributions.² In South Carolina, under a similar statute, a like rule prevails.³ It would seem but reasonable that if a testator disposed of a part of his estate, and died intestate as to the remainder, then any heir advanced previous to the execution of the will should be charged with such advancement in the disposition of that part of the estate not disposed of by the will; but such is not the rule, and the advanced heir cannot be called to an account.⁴

¹ *Richmond v. Vanhook*, 3 Ired. Eq. 581; *Hurdle v. Elliott*, 1 Ired. L. 176; *Donnell v. Mateers*, 5 Ired. Eq. 7; *Hayes v. Hibbard*, 3 Redf. 23. See *Hawley v. James*, 5 Paige, 318; *Thompson v. Carmichael*, 3 Sandf. Ch. 120; *Turpin v. Turpin*, 88 Mo. 337.

² *Vachell v. Jeffreys*, Pres. Ch. 170; S. C. 2 Eq. Cas. Abr. 435, pl. 7; *Walton v. Walton*, 14 Ves. 317, 322.

³ *Snelgrove v. Snelgrove*, 4 De S. 274. See *McNeil v. Hammond*, 87 Ga. 618. In Ohio, where a father supposed he had disposed of all his estate, but by mistake omitted the residuary clause in his will, it was held that the statute concerning advancements did not apply: *Needles v. Needles*, 7 Ohio St. 432. In Georgia it was said that “if a testator dies intestate purpose y, as to part of his estate, and he gives parts of his estate to children who would be distributees of his estate if he had died intestate as to his whole property, and who would share with other children to whom nothing is given by the will, it must be presumed that he intended to give some of his children an advantage over the rest.” *Walker v. Williamson*, 25 Ga. 549.

⁴ *Donnell v. Mateers*, 5 Ired. Eq. 7; *Johnston v. Johnston*, 4 Ired. Eq. 9; *Watson v. Watson*, 14 Ves. 317; *Cowper v. Scott*, 3 Pr. Wms. 119; *Brown v. Brown*, 2 Ired. Eq. 309. The case of *Norwood v. Branch*, 2 No. Cas. 598, is overruled. In

549. WILL EXECUTED AFTER ADVANCEMENT MADE.—

If a father give his child a sum of money by way of advancement, and afterward execute his will devising his estate to his children in certain shares, but says nothing about the advancement to the child thus advanced, such advancement cannot be deducted from the amount received by such child under the will; for it is conclusively presumed that this child was to receive the amount thus advanced in addition to that given by the will. But if the testator fix a value in his will upon the amount thus given, and declare that the amount thus fixed shall be deemed an advancement, then to the amount thus fixed it must be so deemed, and the donee is bound by the words of the will.¹ So where a father in his will directed his executor to sell all his real and personal estate, and divide the proceeds of the sale equally among all his children, naming them; and prior to his death he had advanced various sums of money to several of his children and taken from them receipts acknowledging the receipt of the different sums “as my apportionment of his estate” “to be deducted out of the estate of the said” donor, it was held that the will did not direct these advances to be charged against the several children, and they were

some States children provided by will must bring in the property received under the will if they desire to share in the undevise estate: *Sturdevant v. Goodrich*, 3 Yerg. 95; *Pearce v. Gleaves*, 10 Yerg. 359; *Gold v. Vaughn*, 4 Sneed, 245; *Perry v. High*, 3 Head. 349; *Vance v. Huling*, 2 Yerg. 135; *Farnsworth v. Dinsmore*, 2 Swan. 38.

For a construction of the phrase, “Father’s estate,” see *Wilson v. Miller*, 1 P. & H. (Va.) 353.

In Maryland the statute, it would seem, does not apply to a case of partial intestacy: *Hayden v. Burch*, 9 Gill, 79; *Stewart v. Pattison*, 8 Gill, 46; *Manning v. Thurston*, 59 Md. 218; *Pole v. Simmons*, 45 Md. 246.

¹*Arnold v. Haronn*, 43 Hun, 278; *Jones v. Richardson*, 5 Met. 247; *Thompson v. Carmichael*, 3 Sandf. 120; *Clark v. Kingsley*, 37 Hun, 246; *Hays v. Hibbard*, 3 Redf. 28; *Hine v. Hine*, 39 Barb. 507; *Kreider v. Boyer*, 10 Watts, 54; *Proseus v. McIntyre*, 5 Barb. 424; *Zeiter v. Zeiter*, 4 Watts, 212.

not to be considered in dividing the estate.¹ So where a testator, having made complete transfers of certain shares of stock, executed his will devising all his property "as provided by the laws of the State of New York in cases of intestacy," it was held that the stock could not be deemed an advancement.² So where the testator executed a will bequeathing \$1,000 to K, and a few months afterward loaned S \$400 and took from him his note for the loan payable to K or bearer which she handed to K, and a year later executed another and last will by which she bequeathed \$1,000 to K; it was held that the \$400 note (which was then paid) should not be treated as an advancement and payment upon the legacy, for the last will was executed after the gift was made.³ So where a will directed that the testator's property should be distributed equally among his six sons, and also provided that "whatever obligations shall be found that I hold against my sons for whatever I have let them have heretofore *shall be considered as my property and shall be considered as their legacy*, in whole or in part, as the case may be;" and it appeared that one of the sons owed the testator by notes a sum larger than one-sixth part of the estate, it was held that it was not the intent of the testator to treat the notes as an advancement, but his design was that they should be treated as a legacy to an amount equal to the legatee's share in the estate and as a debt for the residue.⁴ So where a father had four sons and a daughter, and he gave three of his sons £500 each, the daughter £200, and directed that none of his sons to whom he should have advanced any sums of money in his lifetime should be entitled to receive his legacy of £500 without bringing such sums

¹ *Camp v. Camp*, 18 Hun, 217, reversing 2 Redf. 141.

² *De Caumont v. Bogert*, 36 Hun, 382.

³ *Clark v. Kingsley*, 37 Hun, 246.

⁴ *Ritch v. Hawxhurst*, 114 N. Y. 512.

into hotchpot; and the residue of his property be divided equally among his four sons and daughter; and the testator had advanced the son to whom he left no specific legacy, at different dates before the date of the will, £728 in small sums, and to another son, who was given a specific legacy, was given two sums after the execution of the will of £500 and £380; it was held that the advancement to this son who was not given a specific legacy should not be taken into account against him, for the reason that the testator directed that none of his sons to whom he should have advanced any sums of money in his lifetime should be entitled to receive his legacy of £500 without bringing any such sum into hotchpot, and that was construed to be a declaration that only those sums advanced toward payment of the legacy of £500 should be deducted, and not any small sums that may have been advanced.¹ In all these instances only the will can be looked to in determining whether or not the gift shall be regarded as an advancement, and parol evidence is not admissible to show that the testator so regarded it.²

550. TO WHAT PROPERTY THE LAW OF ADVANCEMENTS APPLIES.—The English Statute of Distributions applies only to the distribution of personal property.³

¹ *Peacock's Est.*, L. R. 14 Eq. Cas. 236. See *Upton v. Prince*, Cas. t. Talb. 71; *Watson v. Watson*, 33 Beav. 574; *Lawrence v. Lindsay*, 68 N. Y. 108.

² *Watson v. Watson*, 6 Watts, 254; *Treadwell v. Cordis*, 5 Gray, 341; *Nichols v. Coffin*, 4 Allen, 27; *Strother v. Mitchell*, 80 Va. 149; *Caylor v. Merchant*, 5 West L. Mag. 194; *Lyon's Est.*, 70 Ia. 375; *Dunham v. Averill*, 45 Conn. 61; *Chapman v. Allen*, 56 Conn. 152; *Hartwell v. Rice*, 1 Gray, 587; *Jones v. Richardson*, 5 Met. 247; *Hall v. Hill*, 1 Dru. War. 94, 133, S. C. 4 Ir. Eq. R. 27.

A writing given by a child to a father, acknowledging the receipt of an advancement, cannot be used by way of set-off in a suit by the child to recover a legacy given to him in a will afterward made by the father, nor as evidence of the payment or ademption of such legacy: *Jones v. Richardson*, 5 Met. 247. But the execution of a will afterward revoked cannot operate as an extinguishment or merger of an advancement: *Hartwell v. Rice*, 1 Gray, 587.

³ *Cevill v. Rich*, 1 Vern. 181.

Whether or not gifts of real estate must be considered as advancements, or whether only real estate advancements can be offset against other real estate advancements, or personal property advancements can be offset only against other personal property advancements, or a real estate advancement can be offset by a personal property advancement, depends upon the peculiar wording of the statute in force at the place of distribution. If the statute declares that the real or personal property of the intestate shall be distributed equally among his heirs, and that advancements in either shall be taken into consideration in making such distribution, then an advancement in money must be considered.¹ Unless the statute expressly refers to real property, an advancement in personal property cannot be used to offset the amount of the real estate that would otherwise descend to the person thus advanced.² So, if a statute provides that advancements in real estate shall be considered and says nothing about advancements in personal property, a gift of the latter cannot be considered.³ Usually the statutes provide for advancements in either real or personal property;⁴ but a statute having reference only to advancements in real estate does not apply to the gift of a mortgage.⁵ The gift of a remainder in property may be an advancement;⁶ or of a life estate;⁷ or the rent of land onto which a father has put a son;⁸ or to life insurance purchased by the in-

¹ *Mitchell v. Mitchell*, 8 Ala. 414; *Smith v. Smith*, 21 Ala. 761.

² *Havens v. Thompson*, 8 C. E. Gr. 321; *Linell v. Linell*, 6 C. E. Gr. 81; *Davis v. Duke*, 2 Hay. 224 (400); *Marshall v. Rench*, 3 Del. Ch. 239.

³ *Putnam v. Putnam*, 18 Ohio, 347; *Myers v. Warner*, 18 Ohio, 519; *Needles v. Needles*, 7 Ohio St. 432.

⁴ *Needles v. Needles*, 7 Ohio St. 432; *Terry v. Dayton*, 31 Barb. 519; *Headen v. Headen*, 7 Ired. Eq. 159; *McRae v. McRae*, 3 Bradf. 199.

⁵ *Mowry v. Smith* 5 R. I. 255.

⁶ *Raiford v. Raiford*, 6 Ired. Eq. 490; *Hughey v. Eichelberger*, 11 S. C. 36.

⁷ *Wainwright's Estate*, 37 Leg. Int. 104.

⁸ *Robinson v. Robinson*, 4 Humph. 392; *Evans v. Evans*, 1 Heisk. 577; *Wake-*

testate on his life in the name of the donee, where the intestate pays the premiums;¹ or reservation of a life estate to donor and wife is an advancement as to the latter;² but not to the reservation of the mere use of a slave where the property in the slave is vested in the donee's children;³ nor to advancements of real estate situated in another State,⁴ though the rule is different as to personal property.⁵ A gift to a daughter and her child jointly, or to a daughter and her husband jointly, may be an advancement to her;⁶ so is a deposit in the joint names of the donor and donee.⁷

551. HEIR RELEASING TO ANCESTOR HIS PROSPECTIVE INTEREST IN HIS ESTATE.—The question we are considering in this section is not a sale of the heir's prospective interest in his ancestor's estate to a third person; but it is a release by the heir to his ancestor of what he would inherit at such ancestor's death. The authorities are one that a release by a child to a father or mother, or by a grandchild to its grandparents, of his expectancy

field v. Gilleland, 18 S. W. Rep. 768; Shawhan v. Shawhan, 10 Bush. 600. See Montjoy v. Maginnis, 2 Duv. 186.

¹ Rickenbacker v. Zimmermann, 10 S. C. 110. See Chase's Estate, 7 Pa. C. C. 298; *In re* Richardson, 47 L. T. N. S. 514, and Worthington v. Curtiss, 1 Ch. Div. 419.

² Wilks v. Greer, 14 Ala. 437.

³ Cawthon v. Coppedge, 1 Swan. 487.

⁴ McRae v. McRae, 3 Bradf. 149.

⁵ Blackerry v. Holton, 5 Dana, 520. *Contra*, Hoggett v. Gibbs, 15 La. Ann. 700; Succession of Tournillon, 15 La. Ann. 263.

⁶ Kyle v. Conrad, 25 W. Va. 760; Edwards v. Freeman, 2 P. Wms. 435; Weyland v. Weyland, 2 Atk. 632.

⁷ Talbot v. Cody, L. R. 10 Ir. Eq. 133. In Illinois the statute concerning advancements applies to transactions both before and after its passage: Simpson v. Simpson, 114 Ill. 603. See Wallace v. Reddick, 119 Ill. 151. An agreement for an advancement of real estate, followed by possession, will not be enforced if the result would bring about an injustice to the other heirs: McMahon v. McMahon, 69 Ia. 115. But see when specific performance will be decreed: McFerran v. McFerran, 69 Ind. 29.

in such father, mother, or grandparent's estate, when made in consideration of a present benefit bestowed, is binding, and will deprive such child from claiming anything from the ancestor's estate at his death.¹ Thus where a son executed a receipt reciting "payment in full up to date for all services rendered, and all *claims* now and in the future, against [the ancestor] and his estate, living or dead, and that he has no further *claim*, in any shape, manner, or form against [the ancestor] or heirs or any one else bearing the name," it was held that the words *claims* and *claim* referred to the interest of the heir in the estate of the ancestor, and that the release was valid, even against subsequent attaching creditors.² Usually these releases are in writing, signed by the heir expectant;³ but the execution of a deed by the donor reciting that the property given is given in full of all future claim on the donor's estate is sufficient to bar the heir from setting up any claim to the donor's estate on his death;⁴ and so the same is true where the donor executes an ordinary deed and the donee executes back a receipt reciting that it is in full of all future claims on the donor's estate;⁵ or the donor executes back a deed in full of all future claims.⁶ Some are cases of releases under seal, and the

¹ Galbraith v. McLain, 84 Ill. 379; Simpson v. Simpson, 114 Ill. 603; Kershaw v. Kershaw, 102 Ill. 307; Long v. Long, 118 Ill. 638, reversing 30 Ill. App. 559; Jones v. Jones, 46 Ia. 466; Cushing v. Cushing, 7 Bush. 259; Gray v. Bailey, 42 Ind. 349; Smith v. Smith, 59 Me. 214; Nesmith v. Dinsmore, 17 N. H. 515; Quarles v. Quarles, 4 Mass. 680; Kenney v. Tucker, 8 Mass. 142; Havens v. Thompson, 11 C. E. Gr. 383; Steele v. Frierson, 85 Tenn. 430; Bishop v. Davenport, 58 Ill. 105; Fitch v. Fitch, 8 Pick. 480.

² Liginger v. Field, 78 Wis. 367.

³ Gray v. Bailey, 42 Ind. 349; Jones v. Jones, 46 Ia. 476; Galbraith v. McLain, 84 Ill. 379; Cushing v. Cushing, 7 Bush. 259; Havens v. Thompson, 11 C. E. Gr. 383.

⁴ Kershaw v. Kershaw, 102 Ill. 307; Simpson v. Simpson, 114 Ill. 603; Parsons v. Ely, 45 Ill. 232.

⁵ Smith v. Smith, 59 Me. 214.

⁶ Quarles v. Quarles, 4 Mass. 680. This instrument was under seal.

courts seems to place their decisions on the fact of the seal importing a consideration.¹ But a quit-claim deed to the ancestor, describing the lands of the latter was held not to be binding on the heir, because not evidenced as an advancement is required by statute to be evidenced.² In New York a son received a parol gift of real estate from his father, went into possession, and died. The value of the land thus given was equal to the amount his children were entitled to of their grandfather's estate. The agreement was that the land should be in full of all claims on the grandfather's estate; and it was held that the children were not entitled to any part of the grandfather's estate, on the ground, however, that the land was worth as much as they would receive were it yet a part of the estate to be divided.³ In Vermont it is held that a release in full, not under seal, is not binding, though the court did not lay much stress upon the lack of a seal, but upon the fact that the statute concerning advancements did not apply to an instance of this kind; but it was considered to be an advancement to the extent of the value of the property thus received.⁴ So in Indiana where a father gave his son a sum of money under a verbal agreement that it should be in full of all claims of the son to his estate, and the father died seised of certain real estate, it was held that the amount thus received should be treated only as an advancement of the amount paid.⁵

¹ *Barham v. McKneely* (Ga.), 15 S. E. Rep. 761.

² *Long v. Long*, 118 Ill. 638.

³ *Parker v. McCler*, 36 How. Pr. 301; S. C. 5 Abb. N. S. 97; 3 Keyes, 318.

⁴ *Buck v. Kittle*, 49 Vt. 283; *Robinson v. Robinson*, Brayt. 59; *Robinson v. Swift*, 3 Vt. 283. This was also held in *Adam's Estate*, 35 Pa. L. Jr. 285.

⁵ *Stokesberry v. Reynolds*, 57 Ind. 425. In Maryland a release by the heir is a nullity: *Young's Estate*, 3 Md. Ch. 461. A husband cannot make an assignment or transfer of his wife's interest in expectancy, even of personal property: *Needles v. Needles*, 7 Ohio St. 432. In this last case all releases of an expectancy are held void. If one child release another child from liability to account at their father's death for an over-due amount it has received, no one can object

552. PURCHASER OF HEIR'S INTEREST TAKES SUBJECT TO ADVANCEMENT MADE.—The purchaser of an heir's interest, after his ancestor's death, takes it subject to any advancements made to such heir during the ancestor's life, although he have no knowledge of the transaction at the time of the purchase.¹ So the creditors of the heir are likewise bound.² And if the heir has been fully advanced, he has no interest in the real estate of the ancestor,³ and a judgment against such an heir is not a lien on any part of the land of his ancestor.⁴ A purchaser from an heir after the death of the ancestor stands exactly in the shoes of such heir; and if any of his co-heirs have been advanced, or advanced more than such heir, he may insist that these advanced heirs shall account for the amounts advanced to them.⁵ A father made a will disposing of all his property in five shares, giving five to his grandchildren, and providing that their parents should have its use and control during their lives. Three years afterward he delivered to his children certain tracts of land, and took from them papers, duly

but the person executing the release; and it is binding on him until he repudiates it: *Andrews v. Halliday*, 63 Ga. 263.

A son entered into business with his father, the entire capital of the firm consisting of money which belonged to the son's mother; subsequently the father transferred the business to the son, taking a judgment note. When the father attempted to collect the judgment the son resisted on the ground that the money was part of his mother's estate, and his father had no right to it. The son then proposed to give his father a receipt acknowledging that he had received from him the money on account of his share in his mother's estate. This proposal was acquiesced in by the father, who made no further attempt to collect the judgment. On the distribution of the mother's estate, the court found, as a conclusion of law, that the amount was an advancement from the mother's estate, and not a debt due the father, and that the agreement of the son operated as an estoppel: *Skinner's Appeal*, 1 Mon. (Pa.) 439.

¹ *Steele v. Frierson*, 85 Tenn. 430; *Gillian v. McCormack*, 85 Tenn. 597.

² *Liginger v. Field*, 78 Wis. 367.

³ *Flesher v. Mitchell*, 5 W. Va. 59.

⁴ *Liginger v. Field*, *supra*.

⁵ *Duncan v. Henry*, 125 Ind. 10.

sealed, acknowledging that they had received the property described "as part of my portion of his [the father's] estate under his will, and which I am to hold as his will directs after his death, and which is to be taken and considered as a part of my portion directed to be given me by the will aforesaid." These papers were duly recorded in the clerk's office of the county where the land was situated. Five years afterward one of the sons sold his land to his brother, who, three years later, sold his tract and the one he had bought to a stranger, who bought without any notice of a defect in the title, except the constructive notice arising from the recording of the papers. At the time of the sale to the stranger the son selling was in possession, and his father still living. As against this purchaser the court decided that the father was estopped to set up title to the land inconsistent with that described in the recorded papers; that the purchaser got from the son such title and right to the land as was described in the papers, according to the legal tenor and effect thereof; that the legal effect of these papers was that the sons took the property described as an advancement, as their own property, with the condition attached that they should hold it subject to the disposition their father might make of it by his will and at his death, which condition was repugnant to the grant, and void; and that any understanding of the father and sons that the reference in the papers to his will was not to the will, as a will, but only as a paper describing the nature and extent of their title to the property received, whatever might have been its effect between them, could not affect the purchaser from the son, who had a right to stand upon the legal effect of the papers, taken by the father, as the measure of the son's title.¹

¹ Keaton v. Jordan, 52 Ga. 300.

CHAPTER XX.

PRESUMPTION—TRUSTS.

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| 553. Purchase in Name of Stranger. | 566. Same—Disposal of Items in Foregoing Section—"Setting up in Business." |
| 554. Purchase of Land by Father and Conveyance to His Child. | 567. Cost of Education. |
| 555. Contract by Father for Purchase in Child's Name. | 568. Trifling Sums or Articles—Watch—Horse—Furniture. |
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| 562. Purchase by Father in His Own and Joint Name of Child—Purchase in Name of Child and Stranger. | 575. Note of Father—Sealed Bill. |
| 563. Purchase or Gift of Personal Property for or to Child. | 576. Purchase or Gift by Mother for or to her Child. |
| 564. Gift to be Advancement must be by way of Donee's Portion. | 577. Rule of Presumption Applies to a Gift to a Daughter. |
| 565. Argument of Court in Rendering Decision on Facts Stated in Foregoing Section. | 578. Purchase by Grandfather in Name of Grandchild. |
| | 579. Gift by Husband to Wife. |

553. PURCHASE IN NAME OF STRANGER.—In a well considered English case Lord Chief Baron Eyre, said: "The clear result of all the cases, without a single exception, is that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchaser and others jointly, or in the name of others without that of the purchaser; whether in one name or several, whether jointly, or successive, results to the man

who advances the purchase-money; and it goes on a strict analogy to the rule of the common law, that where a feoffment is made without consideration, the use results to the feoffor."¹ In the absence of all rebutting circumstances, this rule has its foundation in a natural presumption, that he who supplies the money never intended that the grantee in the deed should be the beneficiary of the transaction, and that the conveyance was made in this way for the convenience of the purchaser. Every day's experience shows the usefulness of this presumption.² Yet the burden is on the person claiming that the transaction is a trust for his benefit, to establish such claim by clear and satisfactory evidence.³ If only part of the purchase-money is paid by a third person a trust results *pro tanto*.⁴ The trust must arise at the time the purchase is made; and no trust can arise merely by the application of money to the payment of the purchase price, after the purchase

¹ Dyer v. Dyer, 2 Cox, 92.

² The cases upon this point are a legion, and we only cite a few: Edwards v. Edwards, 39 Pa. St. 369; Wilson v. Beauchamp, 44 Miss. 556; Rothwell v. De-wees, 2 Black, 613; Buck v. Pike, 11 Me. 9; Hall v. Young, 37 N. H. 134; Clark v. Clark, 43 Vt. 685; Root v. Blake, 14 Pick. 271; Dean v. Dear, 6 Conn. 285; Boyd v. McLean, 1 Johns. Ch. 582; McCartney v. Bostwick, 32 N. Y. 53; Johnson v. Dougherty, 18 N. J. Ch. 406; Nixon's Appeal, 63 Pa. St. 279; Cecil Bank v. Snively, 23 Md. 253; Bank of U. S. v. Carrington, 7 Leigh. 566; Henderson v. Hoke, 1 Dev. & B. Eq. 119; Williams v. Hollingsworth, 1 Strobb. Eq. 103; Kirkpatrick v. Davidson, 2 Kelly (Ga.), 297; Caple v. McCollum, 27 Ala. 461; Oberthier v. Stroud, 33 Tex. 522; Gass v. Gass, 1 Heisk. 613; Doyle v. Sleeper, 1 Dana, 531; McGovern v. Knox, 21 Ohio, 547; Elliott v. Armstrong, 2 Blakf. 198; Church v. Cole, 36 Ind. 34; Latham v. Henderson, 47 Ill. 185; Johnson v. Quarles, 46 Mo. 423; Tinsley v. Tinsley, 52 Ia. 14; Rogan v. Walker, 1 Wis. 527; Irvine v. Marshall, 7 Minn. 286; Case v. Coddington, 38 Cal. 191; Frederick v. Haas, 5 Nev. 389; Harris v. McIntyre, 118 Ill. 275; Forrester v. Moore, 77 Mo. 651; Sexton v. Hollis, 26 S. C. 231; Murry v. Sell, 23 W. Va. 475; *Ex parte* Houghton, 17 Ves. 251; Reddington v. Reddington, 3 Ridg. 106, 177; Groves v. Groves, 3 Y. & J. 163, 170; Trench v. Harrison, 17 Sim. 111.

³ Bibb v. Hunter, 79 Ala. 351; Carter v. Challen, 83 Ala. 135; Reynolds v. Caldwell, 80 Ala. 232.

⁴ Somers v. Overhulser, 67 Cal. 237; Lipscomb v. Nichols, 6 Col. 290.

has been made.¹ If the money is advanced by way of a loan no trust arises.² So the lending of money by a father to a stranger and taking back a note and mortgage payable to his child is an advancement to it the same as a purchase of property.³ In an Irish case it was said of this kind of a transaction that it cannot "be questioned that investments of this character are in the nature of advancements. In truth it is a question of evidence; and the whole doctrine of advancements is founded on presumption—a presumption which rebuts the other presumption of law—that a purchase by one man in the name of another is a trust for himself. If the party in whose name the investment is made stands in the relation of son or wife to the party making the investment, a presumption of advancement arises; but, if there is evidence to rebut that presumption, the parties will be remitted to their original positions; so that as the question is one of presumption, depending upon circumstances, every case is liable to be encompassed with difficulties, and every case therefore must be regulated by the views taken of its particular circumstances; and though this has been regretted by some judges, the law is so."⁴

554. PURCHASE OF LAND BY FATHER AND CONVEYANCE TO HIS CHILD.—A purchase by a father in the name of a child does not, however, raise the presumption

¹ *Milner v. Freeman*, 40 Ark. 62; *Fittkett v. Durham*, 109 Mass. 419; *Steere v. Steere*, 5 Johns Ch. 1; *Niver v. Crane*, 98 N. Y. 40; *Gerry v. Stimson*, 60 Me. 186; *Booser v. Teague*, 27 S. C. 348.

² *Whaley v. Whaley*, 71 Ala. 159; *Bartlett v. Pickersgill*, 1 Eden. 515; *Harvey v. Pennybacker*, 4 Del. Ch. 445; *Dudley v. Bachelder*, 53 Me. 403; *Gibson v. Foote*, 40 Miss. 788. In some of the States the trust must appear on the face of the deed or there is no trust: see *Campbell v. Campbell*, 21 Mich. 438; *Campbell v. Campbell*, 70 Wis. 311; *Schultze v. New York City*, 103 N. Y. 307; *Stebbins v. Morris*, 23 Blatchf. 181.

³ *Cerney v. Pawlot*, 66 Wis. 262.

⁴ *Fox v. Fox*, 15 Ir. Ch., p. 95.

of a resulting trust, and it is considered not a gift but an advancement to the child. "If there exists a moral duty to advance and provide for the recipient of the legal title," said the Supreme Court of Mississippi, "as in the case of a son or daughter, or wife, then the advancement of the money by the father or husband, will be referred to this moral obligation, and will be placed to the account of a natural duty which he is performing; and the presumption instead of being in favor of a 'trust' will be that it was a gift by way of advancement and provision. In the case of the child or wife, the rule is not inflexible, that it shall be a provision or advancement, but only shifts the burden of proof, so that if it shall be clearly proved that it was not so meant as an advancement, but that the title was placed in the child or wife for other reasons, to be held in trust for the father or husband, then the presumption is overcome."¹ Lord Chief Baron Eyre, referring to this rule, in an early case, said: "The circumstances of one or more of the nominees being a child or children of the purchaser, is held to operate by *rebutting the resulting trust*; and it has been determined in so many cases that the nominee being a child shall have such operation as a *circumstance of evidence*, that it would be disturbing landmarks if we suffered either of these propositions to be called into question—namely, that such circumstance shall rebut the resulting trust; and, that it shall do so as a circumstance of evidence. I think it would have been a more simple doctrine if the children had been considered as *purchasers for valuable consideration*. This way of considering it would have shut out all the circumstances of evidence which have found their way into many of the cases, and would have prevented very nice distinctions, and not very easy to be

¹ Wilson v. Beauchamp, 44 Miss. 556.

understood. Considering it as a circumstance of evidence, there must, of course, be evidence admitted on the other side. Thus it was resolved into a question of intent, which was getting into a very wide sea without very certain guides.”¹ These quotations are supported by a long list of cases, both in this country and in England; and it is to be observed that the presumption, where merely the purchase, the conveyance, and the relationship of the purchaser and grantee are shown, is that the transaction was not a gift but an advancement. Of course it is almost impossible to merely prove these three facts alone, without revealing something more of the transaction which will tend to show a gift, advancement, or a resulting trust. But as between a gift or an advancement, the presumption is that it was an advancement, especially when the property purchased is of considerable value.²

¹ *Dyer v. Dyer*, 2 Cox, 92.

² *Parker v. Newitt*, 18 Ore. 274; *Taylor v. Miles*, 19 Ore. 550; *Wormley v. Wormley*, 93 Ill. 544; *Taylor v. Taylor*, 4 Gilm. 303; *Bay v. Cook*, 31 Ill. 336; *Lewis's Appeal*, 127 Pa. St. 127; *Stanley v. Brannon*, 6 Blackf. 193; *Mallett v. Page*, 8 Ind. 364; *Woolery v. Woolery*, 29 Ind. 249; *White v. White*, 52 Ark. 188; *James v. James*, 41 Ark. 301; *Baker v. Leathers*, 3 Ind. 558; *McClintock v. Loisseau*, 31 W. Va. 865; *Crabbe v. Crabbe*, 1 Mylne & K. 511; *Bone v. Pollard*, 24 Beav. 283; *Lamplugh v. Lamplugh*, 1 P. Wms. 111; *Butler v. M. Ins. Co.*, 14 Ala. 777; *Hatton v. Landman*, 23 Ala. 127; *Brown v. Burke*, 22 Ga. 574; *Maxwell v. Maxwell*, 109 Ill. 588; *Hayden v. Burch*, 9 Gill (Md.), 79; *Lisloff v. Hart*, 25 Miss. 245; *Gee v. Gee*, 32 Miss. 190; *Allen v. De Groodt*, 98 Mo. 159; *Page v. Page*, 8 N. H. 187; *Proseus v. McIntyre*, 5 Barb. 424; *Partridge v. Havens*, 10 Paige, 618; *Creed v. Lancaster Bank*, 1 Ohio St. 1; *Tremper v. Barton*, 18 Ohio, 418; *Phillips v. Gregg*, 10 Watts, 158; *Long v. Long*, 2 Penny. (Pa.) 180; *Douglass v. Brice*, 4 Rich. Eq. 322; *Hamilton v. Bradley*, 5 Hayw. 127; *Dudley v. Bosworth*, 10 Humph. 9; *Gaugh v. Henderson*, 2 Head, 627; *Gass v. Gass*, 1 Heisk. 613; *Shepherd v. White*, 10 Tex. 72; *S. C.* 11 Tex. 346; *Lott v. Kaiser*, 61 Tex. 665; *Shales v. Shales*, 2 Freem. 252; *Lockhard v. Beckley*, 10 W. Va. 87; *Grey v. Grey*, 1 Ch. Cas. 296; *Redington v. Redington*, 3 Ridgw. 106, 179; *Dyer v. Dyer*, 2 Cox, 92; *Beckford v. Beckford*, Lofft. 490; *Stileman v. Ashdown*, 2 Atk. 480; *Taylor v. Taylor*, 1 Atk. 386; *Mumma v. Mumma*, 2 Vern. 19; *Bateman v. Bateman*, 2 Vern. 436; *Grey v. Grey*, 2 Swanst. 594; *Jennings v. Selleck*, 1 Vern. 467; *Finch v. Finch*, 15 Ves. 43;

555. CONTRACT BY FATHER FOR PURCHASE IN CHILD'S NAME.—If a father contract for the purchase of land in his child's name, and die before the conveyance is complete, the presumption is that the contract was an advancement and not a trust.¹ In such instances the estate of the donor is liable for the purchase-money.²

556. CONVEYANCE OR GIFT BY FATHER TO CHILD.—With regard to a gift or conveyance by a father to his son, Vice-Chancellor Malins announced the following rule: "The law is not doubtful that if this had been a transfer³ to a stranger it would have operated as a trust, but if a gift is made in favor of a child the presumption of law is that it is intended as an advancement or provision for the child. The old cases turned upon the question, whether the child was provided for or not, but recent authorities have gone upon whether the gift was intended as an advancement. Thus, in the present case, the transfer having been made to the son, it is thrown upon those who deny that it was an absolute gift to prove that there was no intention on the part of the father to make an advancement or provision for his son."⁴ So in an American case, where a father made conveyances of

Christy v. Courtenay, 13 Beav. 96; *Skeats v. Skeats*, 2 Y. & Coll. C. C. 9; S. C. 12 L. J. Ch. N. S. 22; 6 Jur. 942; *Scroope v. Scroope*, 1 Ch. Cas. 27; *Elliott v. Elliott*, 2 Ch. Cas. 231; *Collinson v. Collinson*, 3 De G., M. & G. 409; *Jeans v. Cooke*, 24 Beav. 513; S. C. 4 Jur. N. S. 57; 27 L. J. Ch. 202; *Ouseley v. Anstruther*, 10 Beav. 453. The advance to a son of money to purchase a farm is an advancement: *Weaver's Appeal*, 63 Pa. St. 309. A purchase in the name of an idiot son is an advancement: *Cartwright v. Wise*, 14 Ill. 417. So to an infant son: *Hall v. Hall*, 107 Mo. 101.

¹ *Redington v. Redington*, 3 Ridgw. 106; *Vance v. Vance*, 1 Beav. 605; *Drew v. Martin*, 2 H. & M. 130; S. C. 10 Jur. N. S. 356; 33 L. J. Ch. 367. See *Nicholson v. Mulligan*, L. R. 3 Ir. Eq. 308.

² *Ib.* See *Crosbie v. McDoual*, 13 Ves. 148; *Skidmore v. Bradford*, 8 Eq. 134.

³ The case concerned a transfer of £3,200 of Reduced Bank Annuities.

⁴ *Hepworth v. Hepworth*, L. R. 11 Eq. 10; *Sayre v. Hughes*, L. R. 5 Eq. 376; S. C. 16 W. R. 662; 18 L. T. N. S. 347.

land to his son the court said: "They were assurances of land, and in each case the value of the property conveyed was large, when considered relatively to the whole estate of the grantor. The presumption of law, therefore, is, that they were advances, and not mere gifts, and hence the burden lies upon those who allege they were not advancements to rebut the presumption raised from the subject and the value of the property thus transferred to the children. Nothing is better settled than that a conveyance of land by a father to a child, either directly or by payment of the purchase-money and having the deed made to the child, is *prima facie* an advanced portion, and this presumption is greatly strengthened when the value of the land bears any considerable proportion to the father's whole estate." The court then proceeds to quote the statute there in force, comparing it with the English Statute of Distributions,¹ and adds: "It is noticeable that the act speaks of settlements, which are ordinarily by deed, and its main purpose is to cause equality among children, not equality in that which may remain at the death of the intestate, but equality in the distribution of all that came from the ancestor. The statute itself then would raise a presumption, without the aid of what is known to be the common understanding, that when a father makes a deed of gift to a child he intends the gift to be an advanced portion, and such is the doctrine of the decisions."² Many cases are to the same effect.³ If the child claims it was an absolute gift, and

¹ The court quotes a remark of Sir Joseph Jekyl, concerning the statute that "the design of the statute was to do what a just and good parent ought for all his children;" and another of Lord Raymond, that "it makes such a will for the intestate, as a father free from partiality of affections, would make:" 2 P.Wms. 440.

² Dutch's Appeal, 57 Pa. St. 461.

³ Hummel v. Hummel, 80 Pa. St. 420; Harper v. Harper, 92 N. C. 300; Sanford v. Sanford 61 Barb. 293; Gordon v. Barkelew, 2 Hal. Ch. 94; McGinnis v. McPeake, Pen. (N. J.) 291; Comings v. Wellman, 14 N. H. 287; Ray v. Loper,

not an advancement, he has the burden to show that fact.¹

557. RECITAL OF CONSIDERATION IN DEED.—The presumption that a conveyance of land by a father or parent to his child is an advancement does not prevail where the deed recites a consideration for the transfer, especially if the consideration is the full, or near the full, value of the land; and the burden to prove it an advancement is upon

65 Mo. 470; *Nelson v. Wyan*, 21 Mo. 347; *Grove v. Spedden*, 46 Md. 527; *Hatch v. Straight*, 3 Conn. 31; *Ruch v. Biery*, 110 Ind. 444; *Mutual Fire Ins. Co. v. Deale*, 18 Md. 26; *Hall v. Hall*, 107 Mo. 101; *State v. Jameson*, 3 G. & J. 442; *Scott v. Harris*, 127 Ind. 520; *Hodgson v. Macy*, 8 Ind. 121; *Dillman v. Cox*, 23 Ind. 440; *Higham v. Vanosdol*, 125 Ind. 74; *Wolfe v. Kable*, 107 Ind. 565; *Holliday v. Wingfield*, 59 Ga. 206; *McMahill v. McMahon*, 69 Ia. 115; *Burton v. Baldwin*, 61 Ia. 283; *Kingsbury's Appeal*, 44 Pa. St. 460; *Lentz v. Hertzog*, 4 Whart. 520; *Hall v. Hall*, 17 S. W. Rep. 811; *Palmer v. Culbertson*, 20 N. Y. Supt. 391.

In England a deed whereby a father gave all his property, of whatever kind, to his son was held not to be an advancement, and the deed was annulled: *Hughes v. Seanor*, 18 W. R. 108. A deed to a child in pay for his services cannot be converted into an advancement: *Murrel v. Murrel*, 2 Strobb. Eq. 148.

¹ *Higham v. Vanosdol*, 125 Ind. 74; *Scott v. Harris*, 127 Ind. 520; *Buch v. Brery*, 110 Ind. 444.

The donor's heirs cannot set up that the conveyance was made to defraud the creditors of the donor, and therefore void: *McClintock v. Loisseau*, 31 W. Va. 865.

The cases of *Scott v. Scott*, 1 Mass. 526, and *Whitman v. Hapgood*, 10 Mass. 437, seem to follow the old rule, allowing proof, however, to be made showing that it was an advancement.

In Illinois something more must be shown than the relationship of the parties, a statute requiring it: *Wallace v. Reddick*, 119 Ill. 151.

Where a father put his son in possession, and he held such possession twenty years and sold the land, and the father made the deed, it was held that the purchase-money was an advancement to the amount for which the land was sold: *Gordon v. Barkelow*, 2 Hal. Ch. 94.

A gift of property by a father to a son not living with him is presumed to be an advancement: *Holliday v. Wingfield*, 59 Ga. 206.

The purchaser at a sheriff's sale assigned his interest in the same, before redemption, to the daughter of the judgment debtor, with his assent and direction, and the judgment debtor failed to redeem. It was held that this was an advancement by the judgment debtor to his daughter, and that his other heirs were precluded from setting up any interest in the land: *McCoy v. Pearce, Thomp. Cas. (Tenn.)* 145.

the person claiming the transaction to be such.¹ If the deed contains a recital that the conveyance is made in consideration of parental love and affection, and partly in consideration of a sum named, the presumption is, perhaps, that it is a sale equal to the consideration paid and an advancement as to the remainder.² Inadequacy of price, however, is not alone sufficient to show an advancement.³

558. GIFT BY FATHER TO INFANT SON.—At one time it was considered that a father's gift to his infant son was not an advancement,⁴ on the ground that the child could not enjoy it nor manage it, and it would not be taken that the father intended to bestow a separate and independent provision on the child. But this rule has long since been abrogated, and infancy is now looked upon as a circumstance peculiarly favoring the claim of advancement.⁵

559. GIFT TO CHILD ALREADY PROVIDED FOR.—If a child has already been provided for, still the transaction is an advancement, though that fact is evidence to rebut the presumption of an advancement, and to show that the son is a trustee.⁶

¹ Miller's Appeal, 107 Pa. St. 221; *Aden v. Aden*, 16 Lea. 453. If the deed contains a recital that it is a gift, the grantee cannot be required to account for it as an advancement: *James v. James*, 76 N. C. 331.

² The question arose in *Bullard v. Bullard*, 5 Pick. 527, but the case turned on another point. It is quite well settled that a transaction may be in part gift and part advancement: *Meeker v. Meeker*, 16 Conn. 383.

³ *Merriman v. Lacefield*, 4 Heisk. 209.

⁴ *Binion v. Stone*, 2 Freem. 169; *S. C. Nels.* 68.

⁵ *Lamplugh v. Lamplugh*, 1 P. Wms. 111; *Christy v. Courtenay*, 13 Beav. 96; *Collinson v. Collinson*, 3 De G., M. & G. 403; *Mumma v. Mumma*, 2 Vern. 19; *Finch v. Finch*, 15 Ves. 43; *Hall v. Hall*, 107 Mo. 101; *Cartwright v. Wise*, 14 Ill. 417 (idiot).

⁶ *Elliot v. Elliot*, 2 Ch. Cas. 231; *Pole v. Pole*, 1 Ves. Sr. 76; see *Grey v. Grey*, 2 Sw. 600; *Lloyd v. Reed*, 1 P. Wms. 607; *Reddington v. Reddington*, 3 Ridgw. 106, 190; *Sidmouth v. Sidmouth*, 2 Beav. 447, 456.

It may be remarked here that insolvency of an ancestor does not defeat the right to have property accounted for as an advancement: *Young's Estate*, 3 Md. Ch. 461.

560. PURCHASE IN NAME OF ILLEGITIMATE SON.—Though the law does not recognize any relationship between a father and his illegitimate son, yet a purchase by the father in his name will raise the presumption of a gift and not one of a resulting trust; for the father is under a moral obligation to provide for a child which he has thus brought into the world.¹ But it is to be observed that no question of advancement can arise between an illegitimate child of an ancestor and his legitimate children, though one of gift or resulting trust may arise. Yet in some of the States statutes permit illegitimate children to inherit from their reputed fathers where they have acknowledged them as their children, in which event questions of advancement may arise.

561. FATHER REMAINING IN POSSESSION—RECEIVING RENTS AND PROFITS—LIFE ESTATE—REVERSIONARY INTEREST.—If the advancement is real property, and after the execution of the deed the father remains in possession, receives the rents, lease or even devise it, this is not sufficient to rebut the presumption of an advancement, whether the son be an infant or adult.² If a father deed his son a tract of land, reserving a life estate, or receiving back from the son a deed conveying a life estate, the remainder or reversion is an advancement.³ So a deed to a child of property charged with payments to other chil-

¹ Beckford v. Beckford, Lofft. 490; see Tucker v. Burrow, 2 H. & M. 515.

² McClintock v. Loiseau, 31 W. Va. 865; Reddington v. Reddington, 3 Redw. 106, 190; Grey v. Grey, 2 Swanst. 600; Dyer v. Dyer, 2 Cox, 92; Woodman v. Morrell, 2 Freem. 32; Sholes v. Sholes, 2 Freem. 252; Scawin v. Scawin, 1 Y. & C. Ch. 65; Williams v. Williams, 32 Beav. 370; Alleyne v. Alleyne, 8 Ir. Eq. 493; S. C. 2 J. & L. 544; State v. Jameson, 3 G. & J. 442; Allen v. Groodt, 98 Mo. 159.

³ Comings v. Wellman, 14 N. H. 287; Rich v. Briery, 110 Ind. 444; Rumboll v. Rumboll, 2 Eden. 16; Murlless v. Franklin, 1 Swanst. 13; Finch v. Finch, 15 Ves. 43; Eales v. Drake, L. R. 1 Ch. Div. 217; S. C. 45 L. J. Ch. 51; 24 W. R. 184; Williamson v. Jeffreys, 18 Jur. 1071.

dren is an advancement to such other children to the extent of the charges.¹ Where a father purchased stock in the name of his son, but received the dividends under a power from the son, it was held that this was an advancement to the son.²

562. PURCHASE BY FATHER IN HIS OWN AND JOINT NAME OF CHILD—PURCHASE IN NAME OF CHILD AND STRANGER.—If a father purchase property in his own and his son's name, jointly, the presumption is that the transaction so far as it relates to the son is an advancement.³ So a purchase in the joint names of a son and stranger is an advancement to the son.⁴

563. PURCHASE OR GIFT OF PERSONAL PROPERTY FOR OR TO CHILD.—Aside from the amount of property, a purchase of personal property in the name and for his son, by a father, is equally an advancement with a like purchase of real property. Of course, the kind of personal property bought, the occasion when it is bought, the wealth of the donor, the condition of the child, and the value of the property bought, are all questions entering into the one of advancements.⁵ So, with certain limitations, a gift of money or personal property to a child will be deemed an advancement, whether it is a gift or

¹ *Lentz v. Hertzog*, 4 Whart. 520.

² *Sidmouth v. Sidmouth*, 2 Beav. 447; S. C. 9 L. J. Ch. N. S. 282. As to land and paying taxes thereon by the father, see *Tuggle v. Tuggle*, 57 Ga. 520.

³ *Dummer v. Pitcher*, 2 M. & K. 262; *Grey v. Grey*, 2 Swanst. 594; *Back v. Andrew*, 2 Vern. 120; *Serope v. Serope*, 1 Ch. Cas. 27. The cases of *Pole v. Pole*, 1 Ves. Sr. 76; and *Stileman v. Ashdown*, 2 Atk. 477, can no longer be regarded as authorities.

⁴ *Hayes v. Kingdome*, 1 Vern. 33; *Kingdon v. Bridges*, 2 Vern. 67; *Lamplugh v. Lamplugh*, 1 P. Wms. 111; *Crabbe v. Crabbe*, 1 Mylne & K. 511; S. C. 36 L. J. Ch. N. S. 181; *In re Eykyn*, 6 Ch. Div. 115.

⁵ *Dummer v. Pitcher*, 2 M. & K. 262; *Sidmouth v. Sidmouth*, 2 Beav. 447; *Hepworth v. Hepworth*, L. R. 1 Eq. 10; *Fox v. Fox*, 15 Ir. Ch. 89; *O'Brien v. Sheil*, L. R. 7 Ir. Eq. 255; *Batstone v. Salter*, L. R. 10 Ch. App. 431.

advancement, depending generally upon the size of the gift, which may be taken either to show or rebut the claim that the transaction was an advancement.¹

564. GIFT TO BE ADVANCEMENT MUST BE BY WAY OF DONEE'S PORTION.—A gift to be an advancement must be by way of the portion the donee would inherit at the donor's death. It is not a mere casual provision or payment. An English case well illustrates this view of the subject. A widower dying intestate left the plaintiff and defendant, his only sons, as his only next of kin. The defendant administered on the estate, and, as he thought, settled it. Thirteen years later the plaintiff filed a bill against the defendant for administration, an accounting, and other relief. At the trial it was found that the intestate had given, advanced, or settled money or property to or on the plaintiff to the amount of nearly £5,000, consisting of, among others, the following items: (a) Sums of money given to the plaintiff before his marriage, and an annual allowance of £200 after his marriage. (b) One hundred guineas, the fee payable on his entering the chambers of a special pleader. (c) An admission to membership of the Middle Temple, £133 8s. (d) Dues payable to that Inns of Court, £32 7s. 6d. (e) The price of a commission in the army purchased for the plaintiff, £450. (f) Cost of outfit for the plaintiff and his wife, and the payment of their passage to India, £350. (g) Several sums paid by the intestate to discharge the plaintiff's debts in India, and but for the payment of which, according to the evidence, he must have left the army. (h) Three sums, amounting to £450, advanced to the

¹ *McDearman v. Hodnett*, 83 Va. 281; *Ford's Estate*, 1 P. & B. (N. B.) 551; *Watkins v. Young*, 31 Gratt. 84; *Johnson v. Hoyle*, 3 Head. 56; *Steele v. Frierson*, 85 Tenn. 430; *Johnson v. Patterson*, 13 Lea, 626; *Stewart v. Pattison*, 8 Gill, 46. But see *Johnson v. Belden*, 20 Conn. 322.

plaintiff after his return from India to enable him to carry on some mining operations. To the defendant it was found that the intestate had given, advanced, or settled upon him, £10,410 8s. 2d. of which £6,387 9s. was made up of varying annual allowances given to him before his marriage, an annual allowance of £200 a year afterward.

565. ARGUMENT OF COURT IN RENDERING DECISION ON FACTS STATED IN FOREGOING SECTION.—In passing on the questions involved, the Master of the Rolls (Jessel) very lucidly illustrated the subject of advancements as applied to the items we have named. “I have always understood an advancement,” said he, “by way of portion is something given by the parent to establish a child in life, or to make what is called a provision for him, *not a mere casual provision* for him—not a mere casual payment of this kind. I agree, you may make provision by marriage portion on the marriage of the child; you may make it on putting him into a profession or business in various ways; you may pay for a commission; you may buy him the good-will of a business or give him a stock in trade: all these things I understand; *they are portions or provisions*. I also agree that, if in the absence of evidence you find a father giving a *large sum* to a child *in one payment*, there is a presumption that it is intended to start him in life and make a provision for him, and if there is a *small sum* you require evidence to show the purpose. But I do not agree that the words of the statute ‘by portion’ are to be disregarded, nor do I agree that the word ‘advancement’ is to be disregarded. It is not every payment you make to the child which is to be regarded as an advancement. *It must be advanced by way of portion*. In every case which I have referred to,

it has been something of this kind. There has either been the settlement itself, or a purpose which every one would recognize for establishing the child or making a provision for the child. I see in the case of *Edwards v. Freeman*¹ the words used by Sir J. Jekyll, M. R., are ‘a provision;’ he says it is to be a *provision*. . . . So that the whole judgment goes upon this, that it is to be a *provision* for a child. Not every payment is a provision for the child, and I think that is what Vice-Chancellor Wood meant when he said in *Boyd v. Boyd*² that *the payment must be made for a particular purpose—he meant with a view to the establishment of the child*. Now, that certainly was the case as regarded the custom of London; nobody thought of taking an account of small sums which a father had given to his children whether they were under or over age.”³

566. SAME—DISPOSAL OF ITEMS IN FOREGOING SECTIONS—“SETTING UP IN BUSINESS.”—In disposing of the case, the court decreed that the entrance fee to the Middle Temple paid for the plaintiff, the sums paid for plaintiff’s commission and outfit, and the aggregate sum of £845 paid for his establishment in business, were advancements. This was upon the ground that these payments were for the purpose of “setting up” the plaintiff in three different callings. Each payment was a provision within that portion of the English Statute of Distributions which declares that any gift, made as such, shall be accounted for by the recipient thereof before he can share in the estate of the intestate from whom he received the gift. The other items received by the plaintiff were held not to be advancements. The sums that had been given

¹ 2 P. Wms. 435.

² L. R. 4 Eq. 305; S. C. 36 L. J. Ch. 877.

³ *Taylor v. Taylor*, L. R. 20 Eq. 155; S. C. 41 L. J. Ch. 718.

to the defendant were held not to have been advancements, and therefore he was not, in order to share the estate with his brother, bound to bring those sums into hotchpot.¹

567. COST OF EDUCATION.—Money expended by a father, or even a mother, in the education of his child are *prima facie* gifts and not advancements, as we have seen in the three preceding sections. This was very well put in a Pennsylvania case. “As a general rule,” said the court, “money expended in the education of a child, is not presumed to be an advancement. The presumption is that the parent makes these expenditures in the discharge of his parental duties, and that all his children are treated with equality in this respect. But this presumption may be repelled by evidence. The tastes, talents, and constitution of one child may be of such a nature as to induce the parent to believe that the expenditure of a large portion of his inheritance, by anticipation, to advance him in the art or profession for which he evinces peculiar tastes and qualifications, might greatly promote his interests and happiness; while the same advantage might be secured to the other children, having dissimilar inclinations and abilities, by giving to them, in some other form, their equal share of the estate. If a parent disposes of his estate in this way, and from motives of this character, who shall gainsay the justice or propriety of his decision? The law does not condemn it.

¹ That money spent in setting up a son in business is an advancement, see *M'Rae v. M'Rae*, 3 Bradf. 199; *Sanford v. Sanford*, 61 Barb. 293; and *Meadows v. Meadows*, 11 Ired. L. 148. Army commission is an advancement: *Kircubright v. Kircubright*, 8 Ves. 51; *Boyd v. Boyd*, L. R. 4 Eq. Cas. 305; S. C. 36 L. J. Ch. 877; 15 W. R. 1071; 16 L. T. N. S. 660; *Andrew v. Andrew*, 30 L. T. N. S. 457; 22 W. R. 682. So much of this opinion as holds that a gift to pay a debt is not an advancement has been overruled: *Blockley v. Blockley*, 29 L. R. Ch. Div. 250; S. C. 54 L. J. Ch. 723; 33 W. R. 777.

On the contrary, a judicious advancement of each child, in pursuits which accord with its taste and capacity, may be the best means of promoting its own happiness, as well as its usefulness to society.”¹ A statute of South Carolina provides that a child should be charged with the value of an advancement, which value should be estimated as of the date of the ancestor’s death. The court considered that this alone was an utter refutation of the claims that the expenses of an education, professional or otherwise, should be charged as an advancement. “It is not the *sum expended*,” said the court, “but the thing which is bought with it—the thing *received by the child*—which constitutes the advancement; nor is the cost of the purchase the measure of the value of the thing advanced. The rule of the statute is that the advancement is to be estimated, not at what it cost, nor even at its value when given by the parent, but according to its value at the parent’s death. No matter whether the negro which a father bestows on his son cost him much or little, it is the value of such a negro at the father’s death which is to be charged to the son. So here, if the education of young May, general or professional, is to be considered an advancement, its value is to be estimated by its intrinsic worth, and not by the money expended in procuring it. Such is the imperative direction of the statute; and I am at a loss for any rule by which a money valuation can be placed upon the mental proficiency resulting from education, whether of one kind or the other.”² The court did not, however, rest its decision exclusively upon this statute, but also rested it upon the general rule that there is no presumption that a parent intended moneys paid for the education of a child to be an advancement. Other cases are to

¹ Riddle’s Estate, 19 Pa. St. 431; Bradsher v. Cannady, 76 N. C. 445.

² Cooner v. May, 3 Strobb. Eq. 185.

the same effect.¹ Even money paid for a professional education of the child is not deemed an advancement.² Nor is there such a presumption where security is taken from the child for the amount received, or where the parent attempts to procure evidence of it as a debt, by note, bond, book account, or otherwise. Thus where a parent expended money for the education of his son, which he charged against the son in his "day book" (wherein he kept his accounts, and in which the son was credited for partial repayments) and not in a "family book," where advanced portions are usually entered, it was held that the money so furnished was not an advancement, but a debt due from the son, intended to be such by the father when it was expended for the use of the son.³ But there is no doubt that if a parent intended money expended in educating a child should be an advancement, and that intent should be clearly shown, the court would so adjudge.⁴

568. TRIFLING SUMS OR ARTICLES—WATCH—HORSE—FURNITURE.—Trifling sums of money paid a child, or small presents made him, are not deemed advancements.⁵

¹ *Pusey v. Desbouvrie*, 3 P. Wms. 320; *Edwards v. Freeman*, 2 P. Wms. 435; *Mitchell v. Mitchell*, 8 Ala. 414; *Fennell v. Henry*, 70 Ala. 484.

² *White v. Moore*, 23 S. C. 456; *Cooner v. May*, 3 Stroth. Eq. 185.

³ *Miller's Appeal*, 40 Pa. St. 57. See *Riddle's Estate*, 19 Pa. St. 431; *Lentz v. Hertzog*, 4 Whart. 520. In some instances money expended for an education is an advancement: *Reynolds v. Reynolds*, 13 Ky. L. Rept. 793; *Succession of Montamat*, 15 La. Ann. 332; *Succession of Tournillon*, 15 La. Ann. 263. In Missouri it was held that where the elder set of children were educated before the younger set were born, the cost of educating the elder should be equalized with the cost of educating the younger, in the distribution of the estate: *State v. Stephenson*, 12 Mo. 178, and see *Duling v. Johnson*, 32 Ind. 155. *Morris v. Burroughs*, 1 Atk. 399, cannot be regarded as an authority.

⁴ See *Robinson v. Robinson*, *Brayt.* (Vt.) 59.

⁵ *Mitchell v. Mitchell*, 8 Ala. 414; *Taylor v. Taylor*, L. R. 20 Eq. 155; S. C. 44 L. J. Ch. 718; *Cooner v. May*, 3 Stroth. Eq. 185; *Sandford v. Sandford*, 61 Barb. 293; *Pusey v. Desbouvrie*, 3 P. Wms. 320; *Fennell v. Henry*, 70 Ala. 484;

Thus a horse and saddle was held not to be an advancement, though the gift of a stallion as a foal-getter was said to be such.¹ So a gift of a watch made with a view to equalize the donee with the other children was charged to him as an advancement.² So a gift of furniture to a child, especially on its marriage, is presumed to be an advancement;³ but this may not be so if the father is possessed of ample property or means.⁴

569. CONTINGENT INTEREST—ANNUITY.—A future or contingent interest or provision made for a child is deemed an advancement, if the contingency is to take place in a reasonable time, as where a portion was payable at the age of eighteen or on marriage. So an annuity settled upon a child is also deemed an advancement.⁵ In a Maryland case it was said that “it is not necessary to constitute an advancement, that the provision should take place in the parent’s lifetime. A portion secured to the child *in futuro*, or to commence after the father’s death, or upon a contingency that has happened, or to arise within a reasonable time, is an advancement.”⁶

Bac. Abr. tit. Exrs. K. In *Crosby v. Covington*, 24 Miss. 619, it is said to be a question for the jury, and this is no doubt true where some evidence is given tending to rebut the presumption that it is an advancement. Considerable sums are not so treated: *Boyd v. Boyd*, 4 L. R. Eq. Cas. 305; S. C. 36 L. J. Ch. 877; 15 W. R. 1071; 16 L. T. N. S. 660.

¹ *Ison v. Ison*, 5 Rich. Eq. 15.

² *Glenn, Ex parte*, 20 S. C. 64.

³ *Shiver v. Brock*, 2 Jones Eq. 137, and *Hollister v. Attmore*, 5 Jones Eq. 373; *Pratt v. Pratt*, 2 Strange, 935; S. C. Fitzg. 284. *Contra*, *Johnson v. Belden*, 20 Conn. 322. See *Kilpin v. Ratley* [1892], 1 Q. B. 582.

⁴ *King’s Estate*, 6 Whart. 370; *Fennell v. Henry*, 70 Ala. 484.

⁵ *Edwards v. Freeman*, 2 P. Wms. 435.

⁶ *Clark v. Willson*, 27 Md. 693; see *Wilkes v. Greer*, 14 Ala. 337; *Hook v. Hook*, 13 B. Mon. 526. That the eldest son in England is not accountable for an annuity in land, see *Chantrell v. Chantrell* 37 L. T. N. S. 220. See, also, where daughters were not charged with annuities: *Hatfield v. Minet*, 8 L. R. Ch. 136; S. C. 47 L. J. Ch. 612; 38 L. T. N. S. 629; 26 W. R. 701; reversing 46 L. J. Ch. 812.

570. PARENT PAYING DEBT OF CHILD.—Where a father pays off a debt owed by his son to a third person, the law presumes the money paid is an advancement, unless it is shown by proof, or circumstances, that it was not intended to be an advancement.¹ Such is the case where a father pays off a purchase-money debt the son owes on real estate that he has purchased.² Especially is this so when the father treats the payment as an advancement and not a debt.³ A number of cases, however, hold that the presumption is that by the payment the son becomes indebted to the father, and that there is no advancement.⁴ And if the father has become the surety of the son and he has been compelled to pay the debt, the presumption is that it is a claim he holds against the son, and that the payment is not an advancement.⁵

571. CHILD EXECUTING NOTE TO PARENT FOR MONEY ADVANCED.—If a parent take a note or security from a child for money loaned or otherwise given him, the presumption is that the amount thus loaned or given is a debt and neither a gift nor an advancement;⁶ but the pre-

¹ *Dilley v. Love*, 61 Md. 603, 612; *Johnson v. Hoyle*, 3 Head. 56. Where a father was surety for his daughter, but the debt as to her was void because of her coverture; and the father paid the debt, it was held that the payment was not an advancement as against her children: *Morr's Appeal*, 80 Pa. St. 427; *Succession of Tournillon*, 15 La. Ann. 263; *Higham v. Vanosdol*, 125 Ind. 74.

² *O'Neale v. Dunlap*, 11 Rich. Eq. 405; *Catoe v. Catoe*, 32 S. C. 595. As to gaming debt, see *Carter v. Cutting*, 5 Munf. 223.

³ *Reynolds v. Reynolds* (Ky.), 18 S. W. Rep. 517.

⁴ *Vaden v. Hance*, 1 Head. 300; *Rains v. Hayes*, 2 Tenn. Ch. 669; *White v. Moore*, 23 S. C. 456; *Hagler v. McCombs*, 66 N. C. 345.

⁵ *Hart v. Chase*, 46 Conn. 207; *White v. Moore*, 23 S. C. 456; *Berry v. Morse*, 1 H. L. Cas. 71; *Johnson v. Belden*, 20 Conn. 322. Thus where father and son gave a note for the purchase-money of land sold to the son, and the father paid the note, and the land was then conveyed by the purchaser to the son, it was held that this was not an advancement: *White v. Moore*, *supra*.

⁶ *Grey v. Grey*, 22 Ala. 233; *West v. Bolton*, 23 Ga. 531; *Batton v. Allen*, 1 Hal. Ch. 99; *Bruce v. Griscom*, 9 Hun, 280; S. C. 70 N. Y. 612; *Kintz v. Friday*, 4 Dem. 540; *Mann v. Mann*, 12 Heisk. 245; *Fennell v. Henry*, 70 Ala. 484; *Jones's Estate*, 29 Pitts. L. Jr. 89.

sumption that it is a debt and not an advancement may be repelled by parol proof.¹ And it is still a debt though the parent never intended to collect it unless he needed the funds during his life.² It is error to allow a note given by a son to his father to go to the jury "as evidence of an advancement."³ Where a father agreed that a note he held against his son should be taken as an advancement, and afterward changed his mind, it was held that he was not bound by the agreement, and could collect the amount due thereon.⁴

572. RECEIPT FOR DEBT—SURRENDER OF NOTE OR BOND.—The release of a debt by a father, owed him by

¹ Fennell v. Henry, 70 Ala. 484; S. C. 45 Am. Rep. 88.

² House v. Woodard, 5 Coldw. 196. If an heir to an estate is indebted to it, this debt may be treated as an advancement when it is less than the distributive share of such heir would be after the debt is added to the amount of the assets of the estate: Springer's Appeal, 29 Pa. St. 208.

There are many cases to the effect that a bond or note given by a child to a father for money received is presumed to be a debt and not an advancement: High's Appeal, 21 Pa. St. 283; Roland v. Schrack, 29 Pa. St. 125; Miller's Appeal, 31 Pa. St. 337; Chusty's Appeal, 1 Grant (Pa.), 369; Harris's Appeal, 2 Grant (Pa.), 304; Seagrist's Appeal, 10 Pa. St. 424; Whelen's Appeal, 70 Pa. St. 410; Dawson v. Macknet, 42 N. J. Eq. 633; Batton v. Allen, 1 Hal. Ch. 99; Harley v. Harley, 57 Md. 340; Denman v. McMahan, 37 Ind. 241; Harris v. Harris, 69 Ind. 181; Brook v. Latimer, 44 Kan. 431; Grey v. Grey, 22 Ala. 233.

This is especially true if the son pay interest on the note: Levering v. Rittenhouse, 4 Whart. 130; Harris's Appeal, 2 Grant (Pa.), 304.

³ Grey v. Grey, 22 Ala. 233.

⁴ Denman v. McMahan, 37 Ind. 241. To a complaint on a note an answer showing that the payee was the father of the maker; that the payee was wealthy; that prior to the execution of the note the father gave the son two horses, stating at the time that the horses were an advancement; that the son was then a minor working on his father's farm and making a member of his family; that when he became of age, at the request of his father, he executed the note sued on upon the representation that it was never to be paid, but only to be held as evidence of an advancement; and that the son, confiding in such representations, and believing them to be true, signed the note, states a good defense: Harris v. Harris, 69 Ind. 181. In Alabama parol evidence is not admissible to show that such a note was an advancement; but this is contrary to the general rule: Fennell v. Henry, 70 Ala. 484.

his son, with the intention thereby to prefer the son is an advancement and not a gift; so the cancellation of notes held by a father against a son, with a like intent, has the same effect.¹ So if the intention of the donor is not made to appear on the face of the receipt, or it is only shown that there is a release of the debt so that the donor could not collect it if he were an heir, then the presumption is that the release of the debt was intended to be an advancement and not a gift; especially is this so when the amount released is large, or it is something more than a mere trifling sum, and approaches an amount appreciably reducing the donee's portion of his parent's estate. In some States, however, the intent of the donor is not a matter of consideration; for the statute arbitrarily says that the transaction shall be taken and deemed an advancement.²

¹ *Bridgers v. Hutchins*, 11 Ired. L. 68; *Gilbert v. Wetherell*, 2 Sim. & St. 254; *Austin v. Palmer*, 7 N. S. (La.) 21; *Hanner v. Winburn*, 7 Ired. Eq. 142. But a promise to cancel them, or forgive the debt, is not a gift nor an advancement: *Denman v. M'Mahin*, 37 Ind. 241.

² *Rees v. Rees*, 11 Rich. Eq. 86; *Glenn, Ex parte*, 20 S. C. 64. A testator directed by will that "all charges against any of my children *standing on my books* at the time of my decease, shall be void;" and his son, being his executor, claimed a credit of \$1,040, the amount of his note to the testator and which the son included in the inventory. This note was never entered in the testator's book, though another of earlier date for \$1,020, of which the last note was claimed to be a renewal, had been so entered and the entry afterward erased. It was held that there was nothing on the testator's books to bring the note within the discharging clause of the will, and that the son must account for the amount he thus owed the estate: *Brolasky's Estate*, 3 Pennv. 329. A son-in-law, after the death of his wife (who had left children), received from her father a large sum of money, "in part of my former wife's share of his personal estate as willed to her, which sum I bind myself to account for to his executors and his other legatees in the final settlement of his estate, without interest." This was held, after the death of the father, to be a loan due the estate, which could be collected before the final account of the administrator had been rendered; and that the son-in-law was not entitled to set it off against anything that might be due from the estate: *Craig v. Moorhead*, 44 Pa. St. 97. See *Caylor v. Merchant*, 5 West. L. Mag. 194. A father conveyed land to his son at the price of \$1,200, and took the son's note, payable to him, for \$200, with interest, and for the remaining \$1,000 took from the son a receipt as follows: "Received of B O [the father] \$1,000 for the use without interest received by me. D O" (the son). It was held that this \$1,000 was not an

573. CHILD PURCHASING PROPERTY WITH PARENT'S MONEY.—If a child, intrusted with its parent's money, purchase property, as land, in his own name, and it is, in the case of land, so conveyed to him without the knowledge or consent of the parent, the son cannot set up title to the property or land, as an advancement to him on the part of the parent; but if the purchase was so made with the consent of the parent, or if the deed was so made with his consent, the presumption is that it was intended as an advancement, which presumption may be rebutted by parol evidence, by declarations of the parties, and by circumstances contemporaneous with the transaction itself.¹ The uninterrupted possession of the parent, claiming title adversely to the deed, will rebut the presumption of an advancement.² Where a son purchased land in his own

advancement, but simply a part of the consideration for the conveyance, payable to the father, but in the hands of the son to use without interest until the father sees proper to require its payment: *Overholser v. Wright*, 17 Ohio St. 157. A father was accustomed to make loans to his children, keeping memoranda of the same as advancements. His son bought land from a third person, borrowing the purchase-money from the father, who paid it to the vendor, taking the title in his own name as security. By his will the father directed that in the distribution of his estate an account should be taken of the amounts advanced to, and the debts due from, his children. It was held that the son in equity was the owner of the land, the father was the mortgagee, and the amount so paid for the land at the instance of the son was an advancement to him: *Chiles v. Gallagher*, 67 Miss. 413.

Where a testator stated in his will that he held certain notes on a legatee which he was to pay to his estate; and on such legatee becoming the executor, produced a receipt for a large sum signed by the testator, stating that the amount therein mentioned was to be a credit on the notes held by him, it was held error, on the trial of a bill for an account filed against such executor by the other legatees, for the court to charge the jury that if they should find the notes extinguished by the receipt, that the executor should account for the same as an advancement. The question was held to be whether the notes were extinguished during the life of the testator; for if they were not, they could pass under the will; otherwise they could not. The question of advancement, therefore, was not involved: *Thrasher v. Anderson*, 51 Ga. 542.

¹ *Peer v. Peer*, 3 Stock. 432; *Gregory v. Winston*, 23 Grat. 102 (mother's money); *Mullen v. Mullen*, 2 Am. L. Rec. 611.

² *Peer v. Peer*, *supra*.

name, with his father's money, and the father did not seem to know he had so purchased, and in a will, not sufficiently attested, he attempted to give the property to the son; it was held that the land so purchased was an advancement to the son.¹

574. DONOR PURCHASING PROPERTY WITH MONEY CHARGED AS AN ADVANCEMENT.—If a father charge money to a child as an advancement so that it can be enforced against it on his death and be deducted from that portion of his estate it would otherwise receive from his estate, and then take the amount as a part of the advancement and invest it in property in his own name, a trust in such property arises in its favor; and this is true though it furnishes part of the purchase-money.² It must be shown that the property was purchased with the money thus advanced; and in the absence of proof of the actual advancement appropriated at the time of the purchase, a letter written by the intestate two years after the purchase, disclosing a promise and intention that the child should have the property, is insufficient to show an advancement or establish a trust.³

¹ *Douglas v. Brice*, 4 Rich. Eq. 322.

² *Beck v. Graybill*, 28 Pa. St. 66. In this case the father conveyed the land to one, who had a wife at the time but afterward married his child thus advanced. The husband claimed the land by virtue of the cash payment and advancement; but it was held that he had no title even though an independent purchaser ignorant of her equitable title.

³ *Wolff's Appeal*, 123 Pa. St. 438.

A father made an advancement to one of his sons and took from him a covenant, by which he agreed "that he would pay to his brothers and sisters, on final settlement of his father's estate, without interest, whatever sum or sums of money he had received, if above his ratable part of said estate." Afterward, the father borrowed a sum of money from his son (not equal to the amount advanced) and gave his bond for it. It was held that the brothers and sisters, not advanced, had no right to restrain the collection of this bond: *Webb v. Lyon*, 5 Ired. Eq. 67.

Where a father, in debt, conveyed, by way of gift or advancement, his land to his children; and two sons, in part consideration of the portion conveyed to

575. NOTE OF FATHER—SEALED BILL.—Of course, a promissory note, without consideration, promising to pay a child a certain sum of money is void, and cannot be enforced against the maker's estate. Consequently, such a note cannot be an advancement. But such is not the case of a sealed note; for such a note is valid, and when collected the amount so collected is an advancement, if it appears that no actual consideration was given for it.¹

576. PURCHASE OR GIFT BY MOTHER FOR OR TO HER CHILD.—A mother does not rest under the same moral obligation to provide for her child as a father, so that proof of a mere purchase by a mother in the name of her child will not raise a presumption of an advancement, but of a trust. Speaking of the presumption that arises from a purchase by a father in the name of a child, the Master of the Rolls, Jessel, said: "It is clear that in that case the presumption can only arise from the obligation, and, therefore, in that case, the doctrine can only have reference to the obligation of a father to provide for his child, and nothing else. But the father is under that obligation from the mere fact of his being the father, and therefore no evidence is necessary to show that obligation to provide for his child, because that is part of his duty. In the case of a father, you have only to prove the fact that he is the father, and when you have done that the obligation at once arises; but in the case of a person *loco parentis* you must prove that he took upon himself the

them, agreed to pay his debts; it was held, in a suit by a judgment creditor, whose debt accrued before the division, to subject the lands so conveyed to the payment of his judgment, that the lands so conveyed to these two sons ought to be first subjected to the judgment, and that the amount of recovery specified in the judgment, in the absence of fraud was conclusive evidence, both as to the fact and amount of the indebtedness: *Swihart v. Shaum*, 24 Ohio St. 432.

¹ *Shotwell v. Struble*, 21 N. J. Eq. 31.

obligation. But in our law there is no moral legal obligation—I do not know how to express it more shortly—no obligation according to the rule of equity—on a mother to provide for her child; there is no such obligation as a court of equity recognizes as such. From *Holt v. Frederick*¹ downward it has been held that no such obligation exists on the part of a mother; and therefore, when a mother makes an advancement to her child, that is not of itself sufficient to afford the presumption in law that it is a gift, because equity does not presume an obligation which does not exist.” This was a case between the mother and her son’s estate, and while the question was one of gift and not a question of advancement between the heirs of the mother, yet it is quite in point; for every advancement is a perfected gift.²

577. RULE OF PRESUMPTION APPLIES TO A GIFT TO A DAUGHTER.—In the case of an advancement to a daughter, it has been said that the presumption is not so strong against a resulting trust as in the case of a gift to a son;³ but this distinction has been contradicted by a number of decisions.⁴

578. PURCHASE BY GRANDFATHER IN NAME OF GRANDCHILD.—Where a child’s father is dead, and the child’s

¹ 2 P. Wms. 356.

² *Bennet v. Bennet*, 10 L. R. Ch. D. 474; S. C. 27 W. R. 573; 40 L. T. 378. The Master of the Rolls reviews *Re De Visome*, 33 L. J. Ch. 332; 2 D. J. & S. 17; *Sayre v. Hughes*, L. R. 5 Eq. 376; S. C. 16 W. R. 662; 18 L. T. N. S. 347; 37 L. J. Ch. 401. See, also, *Stone v. Stone*, 3 Jur. N. S. 708, and *Garrett v. Wilkinson*, 2 De G., G. & Sm 244; *Evans v. Maxwell*, 50 L. T. N. S. 51; *Batstone v. Salter*, 10 L. R. Ch. App. 431; S. C. L. R. 19 Eq. Cas. 250. If the mother is a widow, the courts are inclined to lean toward the view that the transaction is either a gift or an advancement: *Evans v. Maxwell*, 50 L. T. 51. In some American cases this distinction between the presumption of a gift by a father and mother is not noticed: *Watson v. Murray*, 54 Ark. 499.

³ *Gilb. Lex. Pract.* 272.

⁴ *Lady Gorge’s Case*, cited Cro. Car. 550; 2 Swanst. 600; *Jennings v. Selleck*, 1 Vern. 467; see *Woodman v. Morrel*, 2 Freem. 33; *Clark v. Danvers*, 1 Ch. Cas. 310.

grandfather purchases land in the name of such child, the presumption is that it is an advancement and not a trust.¹

579. GIFT BY HUSBAND TO WIFE.—Gifts by a husband to his wife are usually regarded purely as gifts and not as advancements; but in several States statutes put her on the same footing as children, and she is required to account for a gift, in the division of her husband's estate, the same as if she were his child and had received the gift. It therefore becomes of interest to examine the cases in view of these facts. If a husband convey real property to his wife, or purchase real property in her name, he paying the purchase price; or if he give her personal property, or purchase personal property for her and pay the purchase price out of his own funds, the transaction is either a gift or an advancement, *prima facie*, and she is not liable to account for its value either to him or his personal representatives.² But this rule does not

¹ Soar v. Foster, 4 K. & J. 152.

² Gadbury, *In re*, 11 W. R. 895; S. C. 32 L. J. Ch. 780; Drew v. Martin, 3 Hem. & M. 130; 10 Jur. N. S. 356; 33 L. J. 367; Kingdon v. Bridges, 2 Vern. 67; Christ's Hospital v. Budgin, 2 Vern. 683; Fatheree v. Fletcher, 31 Miss. 265; Spring v. Hight, 22 Me. 408; Maxwell v. Maxwell, 109 Ill. 588; Boyd v. White, 32 Ga. 530; Wormley v. Wormley, 98 Ill. 544; Taylor v. Taylor, 4 Gilm. 303; Bay v. Cook, 31 Ill. 336; Parker v. Newitt, 18 Ore. 274; Taylor v. Miles, 19 Ore. 550; Welton v. Devine, 20 Barb. 9. A husband by arrangement with his wife and his two daughters—by a former marriage, one of whom was a minor—purchased lands and built thereon, and paid for the property out of moneys produced by the joint labor of himself, his wife, and the daughters. The deed for the property was taken in the name of the wife, upon the understanding that she should hold it for the benefit of herself and husband during their lives, and after their decease it should go to the daughters. By his will the husband declared he had no real property, but requested the wife to direct her executors to sell the property so purchased, and divide the proceeds between the two daughters and a daughter of his wife by a former husband. It was held that the purchase could not be treated as an advancement to the wife; that there was a resulting trust in favor of the testator, and that the trusts in favor of the daughters, having been declared by parol, were within the statute of frauds and void: Owen v. Kennedy, 20 Gr. Ch. 163.

apply to the case of a woman with whom the donor lives as his wife, or to his mistress.¹ In case of a purchase by the husband for his wife, it matters not that the purchase was made in their joint names.² Thus if a husband lend out his money and take the securities in their joint names, and die, his wife is entitled to the fund by way of survivorship.³ So where a husband directed his brokers to invest a sum of money in stock in the joint names of himself and wife, and the next day they made the purchase, but the transfer was not made until after the death of the husband, it was held that the wife was entitled to the stock.⁴ So where a husband holding a note directed the maker to transfer the debt in his books into the names of himself and wife, expressing an intention to benefit the wife, and he cancelled the note and took a fresh one to himself and wife, it was held, the wife surviving him, that the debt belonged to her.⁵ A sum of money was invested in funds in the joint names of the husband and wife, and the wife, by power of attorney from him, sold out a portion, and with his knowledge kept it locked up in her own special custody until his death. The portion which remained in the funds in their joint names was adjudged to be hers, but the other portion to be a part of his estate.⁶ So where a husband contracted to purchase lands in the names of himself and wife, and died before the whole of the purchase-money was paid or a conveyance executed, it was decreed that this was an advancement both as to the paid and unpaid purchase-money, and on the latter being paid

¹ *Soar v. Foster*, 4 Kay & J. 152; S. C. 4 Jur. N. S. 406.

² *Kingdon v. Bridges*, 2 Vern. 67; *Low v. Carter*, 1 Beav. 426; *Vance v. Vance*, 1 Beav. 605; *Gosling v. Gosling* 3 Drew. 335; *Talbot v. Cody*, 10 Ir. Eq. 138; *Eykyn, In re*, 6 L. R. Ch. Div. 115; S. C. 37 L. T. N. S. 261.

³ *Christ's Hospital v. Budgin*, 2 Vern. 633.

⁴ *Vance v. Vance*, 1 Beav. 605.

⁵ *Gosling v. Gosling*, 3 Drew. 335.

⁶ *Re Gadbury*, 11 W. R. 895; S. C. 32 L. J. Ch. 780.

out of the husband's estate, the vendors were trustees of the property for her.¹ A husband, for a series of years, lodged money in two banks on deposit-receipts, some of which were in his own name and some in the joint name of himself and wife, and he frequently changed deposits already made in his own name into their joint names. At his death there were in the two banks four deposit-receipts in their joint names and one in his, and it was decreed that these joint deposits were advancements for her.² But a transfer into the name of the wife, or into their joint names for mere convenience, is not an advancement.³

¹ *Drew v. Martin*, 2 Hem. & M. 130; S. C. 10 Jur. N. S. 356; 33 L. J. Ch. 367.

² *Talbot v. Cody*, 10 Ir. Eq. 138. *Re Eykyn*, 6 L. R. Ch. 115; S. C. 37 L. T. N. S. 261.

³ *Marshall v. Crutwell*, 20 L. R. Eq. 328; S. C. 4 L. J. Ch. 504.

CHAPTER XXI.

EVIDENCE—REBUTTING PRESUMPTION.

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580. INTENTION OF DONOR.—Whether or not a transaction is a gift or advancement depends upon the intention of the donor unless some statute intervenes, which is seldom the case. The intention of the donor lends color and fixes the character of the transaction, and overrides, when clearly ascertained, all other considerations. In determining the character of the transaction, that is the centre of the inquiry, around which all other questions cluster, and toward which the attention of the court and jury should be directed. The intention of the donor at the time of the gift is the one to ascertain, and not his

intention before and after except in so far as the last two tend to show the former. As a rule the intention of the donee is immaterial and not a question of inquiry; for, if the donor sees fit to give, the intent with which the donee receives is immaterial; for he cannot give character to the transaction as between a gift and an advancement. The rule that the intention of the donor must control is the whole foundation for the admission of the donor's declarations.¹ A very good illustration of the point under discussion occurred in an English case. There a father transferred stock into the joint names of himself, wife, and infant child. This, of course, raised a presumption of an advancement. But the transferrer swore no trust was intended, the transfer having been made under a misapprehension of its legal effect. For ten years the father received and used the dividends. At the time of the transfer he was in good circumstances. On his filing a bill alleging that he was in extreme want, and required the stock for the maintenance of himself and wife and children, and alleging that when he made the transfer he was not aware that he was placing it beyond his control, the court decreed that the infant child should be a trustee

¹ *Williams v. Williams*, 15 Lea, 438; *Steele v. Frierson*, 85 Tenn. 430; *Mason v. Holman*, 10 Lea, 315; *Fennell v. Henry*, 70 Ala. 484; *Merrill v. Rhodes*, 37 Ala. 449; *Clements v. Hood*, 57 Ala. 459; *Comer v. Comer*, 119 Ill. 170; *Weatherhead v. Field*, 26 Vt. 665; *Darden v. Harrill*, 10 Lea, 421; *Higham v. Vanosdol*, 125 Ind. 74; *Law v. Smith*, 2 R. I. 244; *Middleton v. Middleton*, 31 Ia. 151; *Powell v. Powell*, 5 Dana, 168; *Cline v. Jones*, 111 Ill. 563; *Wallace v. Owen*, 71 Ga. 544; *Nolan v. Bolton*, 25 Ga. 352; *Johnson v. Belden*, 20 Conn. 322; *Woolery v. Woolery*, 29 Ind. 249; *Clark v. Willson*, 27 Md. 693; *Parks v. Parks*, 19 Md. 323; *Oller v. Bonebrake*, 65 Pa. St. 338; *Murless v. Franklin*, 1 Swanst. 13; *Sidmouth v. Sidmouth*, 2 Beav. 447; *S. C. 9 L. J. N. S.* 282; *Devoy v. Devoy*, 3 Jur. N. S. 79; 26 L. J. Ch. 290; 3 Sm. & G. 403; *Williams v. Williams* 32 Beav. 370; *Dumper v. Dumper*, 8 Jur. N. S. 503; *S. C. 6 L. T. N. S.* 315; *Fox v. Fox*, 15 Ir. Ch. 89; *Stock v. McAvoy*, 15 L. R. Eq. 55; *S. C. 42 L. J. Ch.* 280; 21 W. R. 520; 27 L. T. 441; *Fowkes v. Pascoe*, 10 L. R. Ch. 343; *S. C. 44 L. J. Ch.* 367; 32 L. T. 545; 23 W. R. 538; *Down v. Ellis*, 35 Beav. 578; *Hoyes v. Kindersley*, 2 Sm. & G. 195.

for the father.¹ If the leading intention of the intestate is equality among his children, what would be an advancement, if the value of the estate would produce equality, will be held a debt against the donee in order to produce equality.²

581. CONTEMPORANEOUS DECLARATIONS AND ACTS OF DONOR.—When the transaction rests in parol, the contemporaneous declarations and acts of the donor are always admissible, no matter who produces them, to prove either a gift or advancement. There is scarcely any other way to prove the character of the transaction; for the acts and declarations of the donor show his intention, and this intention is the heart of the inquiry. They form a part of the *res gestæ*. There are many cases to this effect.³

582. CONTEMPORANEOUS DECLARATIONS AND ACTS OF DONEE.—So likewise declarations and acts of the donee forming a part of the *res gestæ* are admissible, as much so as those of the donor.⁴

¹ *Devoy v. Devoy*, 3 Jur. N. S. 79; S. C. 20 L. J. Ch. 290; 3 Sm. & G. 403. If an article is loaned by a father to his child it shall not be taken as an advancement, unless it was understood that it was not to be returned: *Law v. Smith*, 2 R. I. 244.

² *Darden v. Harrill*, 10 Lea. 421. An agreement among children, unknown to the father, that certain sums shall be advancements does not make them such: *Fitts v. Morse*, 103 Mass. 164.

³ *Fennell v. Henry*, 70 Ala. 484; *Merrill v. Rhodes*, 37 Ala. 449; *Clements v. Hood*, 57 Ala. 459; *Autrey v. Autrey*, 37 Ala. 614; *Middleton v. Middleton*, 31 Ia. 151; *Cline v. Jones*, 111 Ill. 563; *Nolan v. Bolton*, 25 Ga. 352; *Duling v. Johnson*, 32 Ind. 155; *Woolery v. Woolery*, 29 Ind. 249; *Joyce v. Hamilton*, 111 Ind. 163 (prior); *Oller v. Bonebrake*, 65 Pa. St. 338; *Christy's Appeal*, 1 Grant (Pa.), 339; *Bruce v. Slemp*, 82 Va. 352; *Williams v. Williams*, 15 Lea. 438; *Steele v. Frierson*, 85 Tenn. 430; *Mason v. Holman*, 10 Lea. 315; *Harley v. Harley*, 57 Md. 340; *Batton v. Allen*, 1 Hal. Ch. 99; *Arnold v. Barrow*, 2 P. & H. (Va.) 1; *Haverstock v. Sarbach*, 1 W. & S. 390; *McDearmen v. Hodnett*, 83 Va. 281; *Williams v. Williams*, 32 Beav. 370; *Dumper v. Dumper*, 8 Jur. N. S. 503; S. C. 6 L. T. N. S. 315; *Stock v. McAvoy*, 15 L. R. Eq. 55; S. C. 42 L. J. Ch. 230; 21 W. R. 520; 27 L. T. 441; *Fowkes v. Pascoe*, 10 L. R. Ch. 343; S. C. 44 L. J. Ch. 367; 32 L. T. 545; 23 W. R. 538; *Turner v. Turner*, 53 L. T. 379; *Middleton v. Middleton*, 31 Ia. 151.

⁴ *Sidmouth v. Sidmouth*, 2 Beav. 447; *Knabb's Estate*, 30 Leg. Int. 361; S. C. 1 Leg. Chron. 337.

583. PRIOR DECLARATIONS OF DONOR.—Declarations of an intestate made prior to the time of the gift or advancement, showing an intention to make one or the other, are admissible for the purpose of proving his intention, though such expressions are of little value, unless they show a long and fixed determination on the part of the donor, and are continued down until shortly before making the gift.¹

584. SUBSEQUENT DECLARATIONS OF DONOR.—Subsequent declarations of the donor to third persons are not admissible to prove either a gift or an advancement, nor to repel the presumption of an advancement. Thus where it was attempted to show that the donor subsequently said that the property turned over to his child by him was a gift and not an advancement it was held that it was not admissible, although it was sought to introduce it on the ground that it was an admission by him against his interest. “The offered declarations were made several years after the transaction,” said the court, “and were not, in any sense, part of the acts. They were too remote in point of time to be considered as of the *res gestæ*, and they were, therefore, not competent upon that ground. Nor do we think they are competent upon the ground that they were declarations against the interest of the party by whom they were made, inasmuch as so far as his interest was concerned it was immaterial whether the transfer of the money and property was by way of gift or advancement.”² The rule is founded in wisdom for the

¹ *Joyce v. Hamilton*, 111 Ind. 163; S. C. 12 N. E. Rep. 294.

² *Thistlewaite v. Thistlewaite*, 132 Ind. 355; *Harness v. Harness*, 49 Ind. 384, overruling *Woolery v. Woolery*, 29 Ind. 249, and *Hamlyn v. Nesbit*, 37 Ind. 284; *Joyce v. Hamilton*, 111 Ind. 163; *Hatch v. Straight*, 3 Conn. 31; *Ray v. Loper*, 65 Mo. 470; *Nelson v. Nelson*, 90 Mo. 460; *Sockwell v. Bateman*, 1 South (N. J.), 364; *Buchanan's Estate*, 2 Chester (Pa.), 74; *Homiller's Estate*, 17 W. N. C. 238; *O'Neal v. Breecheen*, 5 Baxt. 604; *Mason v. Holman*, 10 Lea, 315;

security of property and the repose of titles, for otherwise the character of such a transaction would at any time after its performance be subject to the whim or caprice of the donor.¹ In a Missouri case it was said: "When the parent gives property to the child he may, at the time, fix upon it, what value he pleases, as an advancement, or he may do so in his will—or probably by a memorandum charging it against the child as an advancement, but his verbal declarations, that he had given property to a child, made to third persons, are not evidence of the fact. That he has given land must first be established by competent evidence, and then the law presumes it to have been by way of advancement, but to permit the gift to be established by the declarations of the parent, made to third persons, is to enable him virtually to disinherit one of his children, without making a last will and testament."²

585. **SUBSEQUENT DECLARATIONS ADMITTED IN CERTAIN FORUMS.**—Notwithstanding the strong array of authorities cited in the foregoing section there are a number of cases holding that the subsequent declarations of the donor are admissible, not only to show that the transaction was a gift, but also to show that it was only an advancement.³

Merriman v. Lacefield, 4 Heisk. 209; *Rains v. Hays*, 2 Term Ch., p. 672; *O'Brien v. Sheil*, L. R. 7 Ir. Eq. 255; *Sidmouth v. Sidmouth*, 2 Beav. 447; *Nelson v. Nelson*, 90 Mo. 460.

¹ *Harness v. Harness*, 49 Ind. 384; *Duling v. Johnson*, 32 Ind. 155; *Sidmouth v. Sidmouth*, 2 Beav. 447; *Parks v. Parks*, 19 Md. 323; *Cecil v. Cecil*, 20 Md. 153.

² *Ray v. Loper*, 65 Mo. 470; *Haverstock v. Sarbach*, 1 W. & S. 390; *Levering v. Rittenhouse*, 4 Whart. 130; *Porter v. Allen*, 3 Barr, 390.

³ *Watkins v. Young*, 31 Gratt. 84; *Law v. Russell*, 2 R. I. 244; *M'Dearman v. Hodnett*, 83 Va. 231. In this last case the court seems inclined to limit them to the proof of a gift, on the ground of an admission: *Phillips v. Chappell*, 16 Ga. 16; *Wallace v. Owen*, 71 Ga. 544; *Johnson v. Belden*, 20 Conn. 322; *Clements v. Hood*, 57 Ala. 459.

Of course dying declarations are not admissible as such: *Middleton v. Middleton*, 31 Ia. 151; *Duling v. Johnson*, 32 Ind. 155.

586. **SUBSEQUENT STATEMENTS OF DONOR TO DONEE.**—Statements made to the donee by the donor at any time are held admissible in some of the cases, either in the nature of admissions on the part of the donor, or even on the part of the donee when not contradicted. If the contest is whether the transaction was a gift or an advancement, then a statement made on the part of the donor to the donee that it is a gift is taken as an admission; but if the statement is that it is only an advancement, and the donee acquiesce therein or does not contradict it, then it is taken as an admission on his part that he is subject to be charged with the amount received in the distribution of the donor's estate.¹

587. **RATIONALE OF DOCTRINE CONCERNING SUBSEQUENT DECLARATIONS.**—It seems to the author that if clear distinctions are borne in mind there need be no confusion on this subject. If the contest is between the donor or his personal representative and donee as to whether there has been created a trust on the one hand, or a gift or advancement on the other, then the donor's subsequent declarations are not admissible except in so far as they support the claim of the donee that there was either a gift or advancement;² for this is an admission against interest. But a subsequent statement by the alleged donor that the transaction was only a trust would not be admissible, because that is not an admission against interest but a self-serving assertion of it. Where, however, the contest is after the donor's death, and is between

¹ *Phillips v. Chappell*, 16 Ga. 16; *Nelson v. Nelson*, 90 Mo. 460; *Prince v. Slemp*, 82 Va. 352; *Fox v. Fox*, 15 Ir. Ch. 89 (father reproved son for interfering with subject-matter of gift); *Clements v. Hood*, 57 Ala. 459; *Autrey v. Autrey*, 37 Ala. 614.

² *West v. Bolton*, 23 Ga. 531; *Murray's Estate*, 2 Chest. (Pa.) 300; *Beresford v. Crawford*, 51 Ga. 20.

the claim on the one side that it is an advancement and on the other that it is a gift, then the subsequent declarations of the donor that it was an advancement and not a gift are not admissible. For then his declarations cannot be said to be against his interest. He has parted with all interest in the property, whether the transaction was either a gift or an advancement. So far as his interest is concerned it is immaterial whether the transfer was by way of gift or advancement.¹

588. CONTEMPORANEOUS ACTS AND DECLARATIONS.—Acts and declarations of the donor that are contemporary with the transaction give effect and color to it, and are always admissible to show whether a gift or advancement was intended. So too the acts and declarations of the donee are admissible. These all form a part of the *res gestæ*.²

¹ *Thistlewaite v. Thistlewaite*, 132 Ind. 355.

² *Williams v. Williams*, 15 Lea, 438; *Sidmouth v. Sidmouth*, 2 Beav., p. 455.

In an early case the following facts were proved: "The evidence to prove this purchase in the name of the son to be a trust for the father consists of, *First*, Deeds: 1. Father possessed the money; 2. Received the profits for twenty years; 3. Made leases; 4. Took fines; 5. Inclosed part in a park; 6. Built much; 7. Provided materials for more; 8. Directed Lord Chief Justice North to draw a settlement; 9. Treated about the sale of it. *Secondly*, Words: 1. Thomas Grey confessed the truth; 2. Advised his father to sell, and buy York House; 3. 'If it was mine,' says he, 'I would sell it;' 4. Before he made his will, said it was his father's; 5. After he made his will, said it was to keep his brother from pretending. The disproof of the trust stands upon the like evidence, Deeds and Words. *First*, Deeds: For Thomas Grey bound with Lord William for £7,000 of the purchase-money. *Secondly*, Words of Lord William. 1. Before the purchase, said he would buy it for his son; 2. After the purchase, said he had bought it for his son; 3. The now purchased land mine, but Gosfield my son's, T. G.; 4. Gosfield was the inheritance of my son's mother, hence would better have bought Hatton Garden. I have no title but my son's will, it being the purchase of my son, T. G. *Thirdly*, Words of Thomas Grey: 1. I believe my father will give me all, but Gosfield is mine already; 2. Thomas Grey, when he lay dying, excused it to his brother Ralph, that he had by his will given Gosfield to his father." *Grey v. Grey*, 2 Swanst. 594.

589. ADMISSION OF DONEE.—The admissions or statements of the donee that the transaction was an advancement are always admissible as an admission or statement against interest. Even the admissions¹ of a married woman are admissible.² Of course such admissions are not evidence in favor of the donee.³

590. CONDUCT OF PARTIES WITH REFERENCE TO SUBJECT-MATTER OF GIFT.—When the controversy is between the alleged donor and donee, the one claiming that the transaction created a trust and the other an absolute gift, then the conduct of the parties (at least before any controversy arose) with reference to the property in controversy is admissible to prove or disprove the claim of either. This is upon the ground that the acts of the person in possession of property is always admissible to explain such possession; for actual and visible possession usually raises the presumption, unless explained or qualified by the evidence, of an absolute ownership in the possessor.

591. DONOR'S DECLARATIONS CONCERNING OTHER GIFTS MADE BY HIM.—The general rule is that declarations of a donor concerning other gifts he has made cannot be shown; but his prior and contemporaneous declarations made with reference to such other gifts, though the character of them is not directly in issue, may be

¹ *Green v. Hathaway*, 36 N. J. Eq. 471; *Williard v. Williard*, 56 Pa. St. 119; *Murray's Estate*, 2 Chest. (Pa.) 300.

² *Clements v. Hood*, 57 Ala. 459.

³ Admissions made by a donee under mistake may be explained: *Chapman v. Allen*, 56 Conn. 152.

Where grandchildren claimed a distributive share of their grandfather's estate, in right of their deceased mother, the admissions of their father, that he had received advancements on her account, made after the grandfather's death, were held not to be evidence against the grandchildren, for they did not claim through the father: *Nelson v. Bush*, 9 Dana, 104.

admissible when they tend to show the donor's fixed and general policy in reference to gifts to his children. Thus where it was sought to prove that the donor at the time, and prior thereto, executed certain deeds and declared that the property described therein was given to the grantees named as separate and independent gifts, and not as advancements; that he intended his sons, the grantees, to have the lands conveyed independent of their distributive shares in his estate; that the negroes which he had given to each of his children, including the plaintiffs as well as the defendants, were separate and independent gifts, and not intended by him as advancements; and that he intended his sons to have the lands conveyed more than his daughters, it was held that the evidence was admissible as tending to show a general and fixed policy of the donor.¹

592. MEMORANDUM MADE BY DONOR.—Memoranda made by the donor contemporaneous with, or even before, the gift stand upon the same footing with the donor's declarations, and are admissible to prove the character of the transaction.² But a mere account kept by the donor in his usual account-books, showing the donor as creditor and the donee as debtor, for certain property received by the latter at a certain price named, or the receipt of a certain sum of money by the latter, is not sufficient to establish either a gift or an advancement; but, on the con-

¹ *Merrill v. Rhodes*, 37 Ala. 449. As a rule, declarations concerning other gifts are not admissible: *Sanford v. Sanford*, 61 Barb. 293; *Murless v. Franklin*, 1 Swanst. 13.

² *Law v. Smith*, 2 R. I. 244; *Bulkeley v. Noble*, 2 Pick. 337; *Pole v. Simmons*, 45 Md. 246; *Hartwell v. Rice*, 1 Gray, 587; *Nelson v. Nelson*, 90 Mo. 460; *Eisner v. Koehler*, 1 Dem. 277; *Fels v. Fels*, 1 Ohio C. C. 420; *Hengst's Estate*, 6 Watts, 86; *Oller v. Bonebrake*, 65 Pa. St. 338; *Whitman's Appeal*, 2 Grant (Pa.), 323; *Hoak v. Hoak*, 5 Watts, 80; *Thompson's Appeal*, 42 Pa. St. 345; *Gillespie v. Platt*, 6 Phila. 485.

trary, shows a mere business transaction—a debt owed by the donee to the donor, and is a circumstance against the claim of an advancement.¹ If the account is kept in what is often termed a “family book,” reciting that the charges are for moneys or property advanced to the person charged, then the presumption that the account shows a debt is rebutted.² The account must, however, be entered at the time the advancement is made; and if it is entered at a subsequent period, it is not entitled to go in evidence any more than subsequent declarations made by the donor. In this respect there is no difference between subsequent declarations and subsequent entries.³ Where a parent makes a charge against a child for money paid it, and afterward expunges the account, this is evidence of a gift and not an advancement.⁴ If the parent declare at the time he erases the account that he intends the property or money an advancement, his conduct is for the jury to consider.⁵ Where a father furnished his married daughter articles of household furniture to an amount over \$500, and entered them on his account-book, declaring at the time that he did not do this for the purpose of making a charge, but for his own gratification; and he afterward expunged the entry thus

¹ Clark v. Warner, 6 Conn. 355; White v. Moore, 23 S. C. 456; Fels v. Fels, 1 Ohio C. C. 420; Miller's Appeal, 40 Pa. St. 57; Harris's Appeal, 2 Grant (Pa.), 304; Bulkeley v. Noble, 2 Pick. 337; Hartwell v. Rice, 1 Gray, 587; Ashley's Case, 4 Pick. 21.

² Mengel's Appeal, 116 Pa. St. 292; Brown v. Brown, 16 Vt. 197; Weatherhead v. Field, 26 Vt. 665; Murray's Estate, 2 Chest. (Pa.) 300.

³ Nelson v. Nelson, 90 Mo. 460; Fellows v. Little, 46 N. H. 27. Of course the donor cannot change the effect of a transaction by changing a contemporaneous entry into one of a different effect: O'Brien v. Sheil, L. R. 7 Ir. Eq. 255.

If money is lent or paid by the father to or for a son, at the request of the latter, and an account is stated by the father and *interest charged*, such loan or payment is a debt and not an advancement: Harris's Appeal, 2 Grant (Pa.), 304.

⁴ Murray's Estate, 2 Chest. (Pa.) 300.

⁵ Wallace v. Owen, 71 Ga. 544.

made, it was held that there was not sufficient proof to show an advancement.¹ In cases of book-accounts, charges, and memoranda, parol evidence is always admissible, unless a positive statute intervenes, to show the actual intention of the donor.²

593. WILL REFERRING TO ACCOUNT TO SHOW ADVANCEMENTS MADE.—It is a very common occurrence for a testator to declare in his will that any child advanced as shown by his books shall be charged with the amount

¹ *Johnson v. Belden*, 20 Conn. 322. In this case it was also held that the mere relationship of parent and child is not sufficient to decide a question of an advancement; nor that the mere fact that a parent has delivered chattels or advanced money to or for a child; nor the equality of patrimonial estate, for in families a judicial discrimination is equitable. In the distribution of an intestate's estate, a memorandum, kept by the parent, of his advancements to his children, indicating a scheme of distribution of specific articles in kind, is only evidence of the fact of the advancements, etc., *prima facie* of their value, and its indications of the intestate's scheme for the distribution of his estate, cannot be used as a will unless properly attested: *Sims v. Sims*, 39 Ga. 108.

² *Mitchell v. Mitchell*, 8 Ala. 414. Thus a father kept an account, in this case, with his own son, upon his books, which was added up, and at the foot was written by the father, "accounted for, as so much that he has had of my estate; if it is over his portion, he must pay back to them." No question having been made of this as a testamentary paper it was held competent to explain the nature of the items, and to detail a conversation his wife had with him in relation to it, to show that the account was not a debt due from the son as an advancement.

Where the application to open a decree that an intestate made no advancements to any of his children, was based upon newly discovered "memorandum of donations" to his children, in his handwriting and dated twenty-five years before his death, but to which he had never called the attention of any of his family, the bill was dismissed: *Langford v. Nabers*, 86 Ga. 449.

That declarations contemporaneous with book entries may be explained by evidence: see *Oller v. Bonebrake*, 65 Pa. St. 338.

Where entries or charges on the books of a deceased parent of property delivered to his children are made in such a manner and under such circumstances as reasonably to exclude the idea of a debt or present gift, they become evidence that they were intended as an advancement: *Fellows v. Little*, 46 N. H. 27; *Thompson's Appeal*, 42 Pa. St. 345; *Gillespie v. Platt*, 6 Phila. 485; *Albert v. Albert*, 74 Md. 526.

A mere entry that the donor had made an advancement to a designated child does not make an advancement if none in fact was made: *Alleman v. Manning*, 44 Mo. App. 4, 9.

therein stated. Thus a testator declared in his will that each of his children were "to be charged in the distribution [of my estate] with what I have given them, or shall have given them at the time of my death, and with which I have charged them in my book and in my foregoing will." Upon an issue to try the truth and validity of certain alleged entries of advancements parol testimony was admitted to show that the entries were not advancements, and that it was competent to ask a witness who had made them in the testator's book whether the sum charged therein against some of the children had been actually advanced. Proof of the testator's admissions that the charges were excessive was also admitted.¹ A testatrix by her will gave her own property, and apportioned other property by virtue of a power in her deceased husband's will, equally among her children, directing that no child should be charged with any money advanced on its account, unless the same was charged in a memorandum filed with her will. She acquitted each of her children from all debts due her or her husband's estate, unless charged in such memorandum. After making this will she gave one of her daughters a sum of money who signed a receipt therefor stating that the sum was to be deducted from out of the estate of her father's which was coming to her. This receipt was deposited by the business agent of the testatrix in a trunk devoted exclusively to papers concerning the testatrix (including her will) and her husband's estate, but was not otherwise connected with the will. It was attempted to charge this sum of money to this daughter, as an advancement, but the court decided that the receipt was not such a memorandum as was contemplated by the will, and the sum advanced could not be deducted from the daughter's share.²

¹ Hoak v. Hoak, 5 Watts, 80.

² Loring v. Blake, 106 Mass. 592. See, also, Paine v. Parsons, 14 Pick. 318. For

594. **STATUTE MAKING BOOK-ENTRY SOLE REPOSITORY OF DONOR'S INTENTION.**—Statutes in a few States make the entry in the books of the donor or the donee's receipt the sole repository of the donor's intention, and exclude all parol evidence of that intention. Thus a statute provided that "all gifts and grants shall be deemed to have been made in advancement, if they are expressed in the gift or grant to be so made, or if charged in writing by the intestate as an advancement, or acknowledged in writing as such by the child or other descendant." The donee and her husband signed a receipt, as follows: "Received of J. S. \$500, it being a part of my wife's portion." This receipt was found among the papers of the donor at his death, and was deemed sufficient proof of the advancement. So an acknowledgment by a husband, whose wife was insane, of a gift from her father for her support, "as a part of her portion out of her father's estate," preserved by the father in a bundle of letters relating to her sup-

an instance where the account was proved in an insolvency court, see *Bigelow v. Poole*, 10 Grey, 104. If a will provide that the devisees shall be chargeable with "any book accounts which may stand charged in my books" against them, entries made thereafter of amounts received by the devisees may be used in evidence in determining the amount of the advancements: *Whitman's Appeal*, 2 Grant (Pa.), 323.

By a paper a testatrix gave certain sums of money to her children therein named, and declared that the sums thereby given were "absolute gifts; and in any distribution to be made at my death of my real and personal estate, in case I should die intestate, must be taken and considered as absolute gifts and not advancements, and must not be abated or deducted out of the shares of my respective children above mentioned in the distribution of my real and personal estate." After the execution of this paper she gave certain sums of money to several of her children as advancements; and then made another will disposing of her property, and directed that all her children should be charged interest on all money advanced to them from the time they received it up to the time of her death in order that they all may be equal. It was held that the paper executed before the execution of the will showed an intent to make an absolute gift and not an advancement; and that a memorandum of calculations made by her before executing the papers were admissible to show her intention: *Pole v. Simmons*, 45 Md. 246.

port at an asylum for the insane, was deemed to satisfy the statute. But the production of a book of accounts, kept by the deceased, with three leaves cut out, together with evidence of his declarations that he had made charges in his books as advancements to his children, was held not to be competent evidence of such advancements, for the reason that the statute required evidence of advancements to be in writing, and there was no evidence that these three missing leaves contained an entry of the advancements claimed.¹

595. STATUTE REQUIRING ADVANCEMENT TO BE IN WRITING.—In some States statutes require the gift to be expressed in writing as an advancement before it can be deemed an advancement. Thus in Illinois a statute provided that “no gift or grant shall be deemed to have been made in advancement, unless so expressed in writing by the intestate as an advancement, or acknowledged in writing by the child or other descendant.” A donor conveyed land to the donee without using any expression in the deed that the conveyance was by way of advancement; and it was held that the transaction could not be taken as an advancement however clear the donor’s intention appeared to make it such.² Consequently, parol evidence is not admissible in that State to show an advancement.³ A father in that State, for the expressed consideration of one dollar and love and affection, conveyed to his daughter a lot worth \$1,000; and also for a like consideration

¹ *Hartwell v. Rice*, 1 Gray, 587. The words, “Articles that I let my daughter N. have,” in a book containing memoranda made by a parent of advancements to his other children is a sufficient compliance with the statute, and parol evidence is not admissible to control or vary it; *Bulkeley v. Noble*, 2 Pick. 337.

² *Long v. Long*, 118 Ill. 638; *Wallace v. Reddick*, 119 Ill. 151; *Wilkinson v. Thomas*, 128 Ill. 363; *Comer v. Comer*, 119 Ill. 170; *Filman v. Filman*, 15 Gr. Ch. 643.

³ *Wilkinson v. Thomas*, *supra*.

two eighty-acre tracts of land to his two sons. Ten years later he executed his will, which was not probated on account of a subsequent marriage, in and by which he devised to his daughter \$5, and recited: "She having heretofore received the sum of \$1,000 in real estate. . . . My several sons all had land and other property to the value of at least \$2,000." The court held that the words used in the will were not sufficient to afford evidence of an advancement to the daughter and sons.¹ So where a child gave its father a receipt for articles delivered to it, promising to return them if called for, and the parent wrote underneath that they were not to be exacted, but were to answer as a part of the child's portion, it was held to be an advancement, which could not be varied by parol.² Nor can it be shown that a note given by a child to his father was not to be paid but taken as an advancement.³

¹ *Wilkinson v. Thomas*, *supra*.

² *Bulkeley v. Noble*, 2 Pick. 337.

³ *Barton v. Rice*, 22 Pick. 508. A statute of this character may apply to advancements made before its passage where the death of the intestate occurs after such passages: *Clarke v. Clarke*, 17 B. Mon. 698.

A statute provided that "A memorandum of advancements, in the handwriting of the parent, or subscribed by him, shall be evidence of the fact of advancement, but shall not be conclusive as to the valuation of the property, unless inserted as part of testator's will or referred to therein." It was held that this statute did not exclude evidence of the declarations of the intestate that notes on a son were held as advancements and not debts: *Bransford v. Crawford*, 51 Ga. 20; *West v. Bolton*, 23 Ga. 531; *Sims v. Sims*, 39 Ga. 108. In Rhode Island a statute provided that "If real estate shall be conveyed by deed of gift, or personal estate shall be delivered to a child or grandchild and charged, as a memorandum made thereof in writing by the intestate, or by his order, or shall be delivered expressly for the purpose in the presence of two witnesses, who are requested to take notice thereof, the same shall be deemed an advancement to such child, to the value of such real or personal estate." It was held that this did not exclude other and higher proof of an advancement than is therein designated, but only inferior proof; but it was also held that parol declarations, without evidence of a written memorandum, was not sufficient to show an advancement: *Law v. Smith*, 2 R. I. 244.

In Massachusetts the statute of 1805 prescribed what should be evidence of an

596. PAROL EVIDENCE TO SHOW CONSIDERATION OF DEED.—In the case of a conveyance by a parent to a child the Supreme Court of Virginia said, speaking with reference to evidence to show the true consideration of a deed: "Ordinarily parol evidence is not admissible to add to, vary, or contradict a written statement. We do not think, said Cochran, J., in *Parks v. Parks*,¹ that rule can operate to exclude such evidence when offered to show the particular character of the subject-matter of a deed collaterally adduced to support or oppose as a controverted right to other property than that described by the deed. It is a settled matter that written instruments are to be interpreted according to their subject-matter, and that parol evidence may be introduced to ascertain the qualities and nature of the subject to which the instrument refers. If a deed may be construed by the aid of parol evidence of the nature and qualities of the property conveyed, there certainly can be no objection to the admission of such evidence to show the character of the property in a case where the construction of the deed is not involved. The question presented on the evidence objected to is not one of construction of the bond and lease, nor does it arise between the parties thereto, nor can the determination of it either way affect or change their rights or obligations as they stand upon these instruments; but it is as to the peculiar nature and properties of the estate conveyed, in respect to which these papers are silent; or, in other words, whether that estate

advancement to a child or grandchild, and repealed all prior acts falling within its purview; but it was held that a deed made prior to that statute and which by the existing laws would have been evidence of an advancement should have that effect, the repealing clause notwithstanding, although the grantor died after the statute of 1805 was in operation: *Whitman v. Hapgood*, 10 Mass. 437; *Bemis v. Stearns*, 16 Mass. 200.

¹ 19 Md. 323.

as conveyed takes the character and legal properties of an advancement, or those of a full and absolute gift, without a view to a portion or settlement. The nature of the estate in these respects follows the intention of the donor, and that intention, as we understand the authorities, may be ascertained by parol evidence of the donor's declarations at the time of executing the conveyance, or of the donee's admissions afterward, or by proof of facts and circumstances from which the intention may be inferred. In the absence of such evidence, and of anything in the deed to indicate the intended character of the property conveyed, the law, looking to the equal relationship and right of other distributees, will presume the character most favorable to equal distribution to have been intended by the donor. In this case there is no effort to defeat or impede the title of the grantee to the land conveyed him; there is no question of construction of the deed; there is no question between him and his grantor; the deed is not only not assailed, but is admitted in all its force, and there is no effort made to disturb him in the possession and enjoyment, to the fullest extent, of the property conveyed therein. But when he comes in to claim for his wife an equal share in the partition of the other lands of his wife's father, the other ten children or their descendants deny his right to share further in the estate of the intestate, upon the ground that he has already received, in the lifetime of the intestate, a larger share than can fall to any other child. He exhibits his deed as evidence that he paid \$2,000 for this land. It is well known on all sides, and admitted by him, that he never paid anything for the land (except a conveyance in Kentucky of a few acres of land which he has been allowed for), but he contends that parol evidence cannot be invoked to show what the true consideration

was, and what was the real intention of the grantor as to the said conveyance. Neither his deed nor his title thereunder is questioned; but the question is, whether, when this deed was made, with whatever estate or title it conveyed, was it intended by the grantor as an advancement? That parol evidence may be so admitted and used is undoubtedly the rule. As has been said often by the courts, the exclusion of this extrinsic evidence to show the true design of the grantor would tend to defeat the provisions of our laws for the equal distribution of the intestate's estate; for the introduction of proof for this purpose does not contravene the general rule of evidence excluding parol proof to explain or vary the terms of a written contract. The object being collateral to effect the title to other property evidence can be gone into to show its true character and design."¹

¹ *Bruce v. Slemph*, 82 Va. 352. These propositions are supported by many cases: *Maxwell v. Maxwell*, 109 Ill. 588; *Hall v. Hall*, 107 Mo. 101; S. C. 17 S. W. Rep. 811; *Kingsbury's Appeal*, 44 Pa. St. 460; *Mutual Fire Ins. Co. v. Ded*, 18 Md. 26; *Palmer v. Culbertson*, 20 N. Y. Supp. 391; *McClanahan v. McClanahan*, 14 S. E. Rep. 419; *Gordon v. Gordon*, 1 Met. 285; *Powell v. Powell*, 5 Dana, 168; *Clark v. Willson*, 27 Md. 693; *Parks v. Parks*, 19 Md. 323; *Aden v. Aden*, 16 Lea, 453; *Lott v. Kaiser*, 61 Tex. 665; *Lench v. Lench*, 10 Ves. 511; *Conyers v. Weltman*, 14 N. H. 287; *Stewart v. Pattison*, 8 Gill, 46; *Wilson v. Beauchamp*, 44 Miss. 556; *Murrel v. Murrel*, 2 Strobb. Eq. 148; *Hattersley v. Bassett*, 25 Atl. Rep. 332; *Wilks v. Greer*, 14 Ala. 437.

If the consideration stated is merely nominal, the presumption is that the transaction was an advancement: *Harper v. Harper*, 92 N. C. 300; *Hatch v. Straight*, 3 Conn. 31; *McClanahan v. McClanahan*, 14 S. E. Rep. 419.

In some of the States statutes require the fact of advancement to be stated in the deed, and a failure to make such a statement will not admit of parol evidence to show that the conveyance was in fact an advancement: *Adams v. Adams*, 22 Vt. 50; *Newell v. Newell*, 13 Vt. 24.

In such instances the intention of the grantor must be gathered from the face of the papers: *Weatherhead v. Field*, 26 Vt. 665. Where a statute required an advancement to be evidenced by a writing, a recitation in a deed that the consideration was \$1, and that the donor the same day executed a writing reciting that the land conveyed was conveyed "as portion of his [the son's] patrimony," giving the actual value of the land, it was held that this writing was admissible to show that the land conveyed was an advancement: *Power v. Power*, 52 N. W. Rep. 60.

597. EVIDENCE TO REBUT PRESUMPTION ARISING FROM PURCHASE IN NAME OF AND CONVEYANCE TO CHILD.—Parol or other legitimate evidence is always admissible to rebut the presumption of an advancement arising from the act of a parent purchasing land in the name of and procuring it to be conveyed to his child. This evidence must be such as to show his intentions at the time of the purchase of the conveyance, or at the time of the conveyance or both.¹ This rule applies to purchases of both real and personal property.² Thus a father having purchased stock in his son's name, the latter gave him a power of attorney to receive the dividends, which he did during his life; yet the transaction was adjudged to show an advancement

If the object of the conveyance is to protect the land from the grantor's creditors it is no advancement, though we apprehend the grantee would keep the land: *Jackson v. Matsdorf*, 11 Johns. 91.

Where a husband conveyed land to his wife, remained in possession, paid the taxes and improved it, and the wife in her will made no allusion to it, it was held that the presumption that it was an advancement was not repelled: *Maxwell v. Maxwell*, 109 Ill. 588.

If the deed recites that the conveyance is a gift by way of advancement, parol evidence to contradict this statement is not admissible unless there has been an accident, mistake, or fraud: *Lott v. Kaiser*, 61 Tex. 665.

There is a line of old authorities which hold that if the deed recites a receipt of the consideration in money, parol evidence is not admissible to show the actual consideration: *Hooper v. Eyles*, 2 Vern. 480; *Williams v. Williams*, 3 West. L. Mag. 258; *Ambrose v. Ambrose*, 1 P. Wms. 321; *Ryal v. Ryal*, 1 Atk. 59.

Where a father had no other property than that he had conveyed to his infant son, and he made no provision for either his wife or children, and after the conveyance the father remained in possession and treated the land as his own in every respect, the presumption of a gift or advancement was deemed rebutted: *Hall v. Hall*, *supra*. Acts of ownership asserted over the property conveyed are always admissible to rebut the presumption of a gift or advancement: *Stock v. McAvoy*, 15 L. R. Eq. 55; S. C. 42 L. J. Ch. 230; 21 W. R. 520; 27 L. T. 441.

¹ *Murless v. Franklin*, 1 Swan. 13; *Jeans v. Cook*, 24 Beav. 513; S. C. 4 Jur. N. S. 57; 27 L. J. Ch. 202; *Williams v. Williams*, 32 Beav. 370; *Shepherd v. White*, 10 Tex. 72; S. C. 11 Tex. 346; *Lott v. Kaiser*, 61 Tex. 665; *Page v. Page*, 8 N. H. 187; *Kerr v. Dickinson*, 7 Sup. Ct. Rep. of N. S. W. 12.

² *O'Brien v. Sheil*, 7 Ir. Eq. 255; *Fox v. Fox*, 15 Ir. Ch. 89.

and not a trust.¹ In the case of land purchased by a father in his child's name, it was shown that the father agreed to allow a tenant to retain his possession at an increased rent without consulting the child, and during his life received the rent and paid the outgoings; and it was held that this ostensible possession by the father rebutted the presumption of an advancement.²

598. **ADVANCEMENT IN WRITING.**—If a transaction is in writing, and the claim is made that it is a gift on the one side and an advancement on the other, the authorities are not in unison as to whether parol evidence is admissible to show either the one or the other. It is easy to see how various phases of this inquiry may arise. Suppose the writing declares that the property is given purely as a gift, or as an advancement; or it simply avers words of gift without declaring that it shall be taken as an advancement. It is quite evident that in the latter instance the question must be judged somewhat from a different standpoint than it would in the two former instances. In the

¹ *Sidmouth v. Sidmouth*, 2 Beav. 447; S. C. 9 L. J. Ch. N. S. 282; *O'Brien v. Sheil*, 7 Ir. Eq. 255.

Where the purchase of stock is made in the joint names of father and child, or wife, and the father causes the transfer to be made jointly to himself and his child or wife, evidence to rebut the presumption of a gift or advancement must be cogent to overcome such presumption; and the fact that the parent drew the dividends on the stock is regarded as rather immaterial in showing his dominion over the stock: *Fox v. Fox*, 15 Ir. Ch. 89; *George v. Howard*, 7 Price, 661; *Down v. Ellis*, 35 Beav. 578; *Forrest v. Forrest*, 11 Jur. N. S. 317; S. C. 34 L. J. Ch. 428; 13 W. R. 380; 11 L. T. N. S. 763; *Fowkes v. Pascoe*, 10 L. R. Ch. 343; S. C. 44 L. J. Ch. 367; 32 L. T. 545; 23 W. R. 538; *Devoy v. Devoy*, 3 Jur. N. S. 79; 26 L. J. Ch. 290; 3 Sm. & G. 403. Shares of stock transferred by a father into his son's name merely to qualify him as a director is not an advancement: *Gooch, In re*, 62 L. T. 384; S. C. W. N. C. (1890) 59; 6 T. L. Rep. 224.

² *Stock v. McAvoy*, 15 L. R. Eq. 55; 42 L. J. Ch. 320; 21 W. R. 520; 27 L. T. 441. In this case there was also evidence of an intention to recover successive life interests to the father and mother; and this was held a distinct indication that no advancement was intended. See, also, *Nicholson v. Mulligan*, 17 W. R. 659; S. C. 3 Ir. Eq. 308.

one the intention is clearly put in writing, the highest and best evidence that can be used to show the intention ; while in the other the intention is merely an inference of law from the facts stated in the paper. And it may be laid down as a rule that, in the absence of fraud, accident, or mistake, where the instrument of gift recites that the property is an absolute gift or a gift by way of advancement, parol evidence is not admissible to vary or contradict its terms.¹ But where only words of gift are used—or words of conveyance—and nothing is said that the property given shall be an advancement or a gift, then parol or other evidence is admissible to show that it was either a gift or an advancement.²

599. WILL DECLARING WHAT SHALL BE DEEMED AN ADVANCEMENT.—If a will declares what shall be considered an advancement, then no evidence is admissible to in fact show that it was not. If the transaction was an absolute gift, yet the testator may charge the donee with it as an advancement, by declaring that it shall be so considered, and the donee cannot object.³ If the will is clear

¹ *Lott v. Kaiser*, 61 Tex. 665; see, also, *Marshall v. Rench*, 3 Del. Ch., p. 257, where the same rule is strongly enforced; *Kirk v. Eddowes*, 3 Hare, 509; *Weems v. Andrews*, 22 Ga. 43.

² *Phillips v. Chappell* 16 Ga. 16; see *Weall v. Rice*, 2 R. & M. 251, 263; *Booker v. Allen*, 2 R. & M. 270; *Lloyd v. Harvey*, 2 R. & M. 310, 316; *Lord Glengall v. Barnard*, 1 Keen, 769.

It may be shown that a note given by a son to a father was never to be paid, but the amount for which it was given was to be considered an advancement: *Dawson v. Macknet*, 42 N. J. Eq. 633; *Brook v. Latimer*, 44 Kan. 431; *Grey v. Grey*, 22 Ala. 233; *Jennings v. Jennings*, 2 Heisk. 283; *Ruch v. Biery*, 110 Ind. 444; *Harris v. Harris*, 69 Ind. 181, unless some positive statute forbids it: *Glanville v. Whitaker*, 75 Ga. 523.

³ *McAllister v. Butterfield*, 31 Ind. 25; *Nolan v. Bolton*, 25 Ga. 352. In this case the will ran: "It is my will and desire that at the division of my property each one" [legatee] "shall be charged with and account for in said division all money or property they have received from me, so as to make them share equally in the property to be divided, and in advance." It was held that this covered both debts and gifts.

The word "advancement" used in a will need not be given its technical sense

then no resort can be had to parol or other evidence to determine what is or is not an advancement; for that is fixed by the will, and is to be determined solely by a construction of its terms.¹

600. AMOUNT OF INTESTATE'S ESTATE—VALUE OF GIFT—SURROUNDING FACTS.—It is always admissible to show the amount of the intestate's property at the time the gift is made (not at the time of his death), the amount or value of the property given to the heir sought to be charged with an advancement, and the amount or value of any property given to any of the other heirs of the deceased. If the amount given is large, it will be assumed to have been an advancement, in the absence of proof to the contrary,² especially where it is shown that the gift was a very considerable portion of the donor's estate,³ though mere inequality is not enough;⁴ nor is the fact if the testator evidently did not use it in that sense, but did not use it in a popular sense: *Eisner v. Koehler*, 1 Dem. 277.

¹ *Hufsmith's Estate*, 65 Pa. St. 141; *Hummel v. Hummel*, 80 Pa. St. 420; *Woodruff v. Migeon*, 46 Conn. 236; *Lyon's Estate*, 70 Ia. 375; *Wright's Estate*, 6 W. N. C. 337; S. C. 89 Pa. St. 67; 93 Pa. St. 82.

Evidence is not admissible to contradict the recitals of a will: *McAllister v. Butterfield*, 31 Ind. 25; nor to show that there was a mistake in the amount the will alleges was advanced: *Painter v. Painter*, 18 Ohio, 247; but otherwise of a book entry: *Alleman v. Manning*, 44 Mo. App. 4, 9.

Nor can an inequality in the advancements raise an intention contrary to that expressed in the will: *McFall v. Sullivan*, 17 S. C. 504; *Andrews v. Halliday*, 63 Ga. 263.

Power given in a will to advance gives power to advance by deed of real estate: *Frenke v. Auerbach*, 72 Md. 580.

When a clause in will applies only to the residue of estate, and there is no residue, the law of advancements does not apply: *Hammett v. Hammett*, 16 S. E. Rep. 293.

² *Bruce v. Griscom*, 9 Hun, 280. 283; *Grattan v. Grattan*, 18 Ill. 167; *Kintz v. Friday*, 4 Dem. 540, 543; *Clements v. Hood*, 57 Ala. 459; *Fennell v. Henry*, 70 Ala. 484; *Merrill v. Rhodes*, 37 Ala. 449; *Autrey v. Autrey*, 37 Ala. 614; *Smith v. Smith*, 21 Ala. 761.

³ *Tuggle v. Tuggle*, 57 Ga. 520; *White v. White*, 3 Dana, 374; *Knabb's Estate*, 30 Leg. Int. 361; S. C. 1 Leg. Chron. 337.

⁴ *Comer v. Comer*, 119 Ill. 170; *Johnson v. Belden*, 20 Conn. 322.

that the father was poor sufficient alone to show that the son holds the property as trustee where the father purchases the property in the name of the son.¹ "What are, or are not, advancements, must always depend very much on the condition in life of the parties, and may be absolutely fixed by their intentions at the time, if they can be ascertained."² So the facts surrounding the transaction may always be shown, or at least may be shown when the evidence is not satisfactory; and we have no hesitancy in saying that "surrounding circumstances,"³ may always be shown, either to aid the presumption of a gift or to rebut it.⁴

601. UNEQUAL DISTRIBUTION.—An unequal distribution of the intestate's estate, which will result if the donee is not required to account as an advancement for the property given, is not alone sufficient to establish an advancement; it does not show the intention of the donor, although it may aid in arriving at that intention upon the view that "equality is equity," and that a presumption is indulged in that a parent usually intends to make an equal distribution of his property at his death.⁵

¹ *Page v. Page*, 8 N. H. 187, 202. Evidence that the property given a son was inherited by the father from the son's mother is too remote to show a gift and not an advancement, and is not admissible: *Thistlewaite v. Thistlewaite*, 132 Ind. 355; S. C. 31 N. E. Rep. 946.

² *Youngblood v. Norton*, 1 Strob. Eq. 122. So where a father gave four children each a tract of land, and charged upon each tract the payment of certain sums of money payable to a designated person, but the amount charged upon the tract given an invalid child was very much less than the several sums charged on the other three tracts, it was held that the court would consider such child's physical condition and ability to earn money to pay the charge, in determining whether the intestate meant that the four portions should be considered equal advancements: *Burbeck v. Spollen*, 10 Am. Rec. 491.

³ Lawyers and courts still insist on using this tautological phrase.

⁴ *Ruch v. Biery*, 110 Ind. 444; *Parks v. Parks*, 19 Md. 323; *Clark v. Willson*, 27 Md. 693; *Dutch's Appeal*, 57 Pa. St. 461.

⁵ *Comer v. Comer*, 119 Ill. 170; *Johnson v. Belden*, 20 Conn. 322. Still, see *Patterson's Appeal*, 123 Pa. St. 269.

602. BURDEN—SUFFICIENCY OF EVIDENCE—QUESTION FOR JURY.—If the facts proved, without the introduction of any evidence of the intestate's intention, raise a presumption of an advancement, or, on the other hand, a presumption of a gift, then the party claiming, in the first instance, that it is not an advancement, and the party claiming, in the second instance, that it is not a gift, has the burden of rebutting the presumption raised by the law.¹ But until such evidence is introduced, showing the transaction, as raises a presumption of an advancement, the party alleging that the transaction was such advancement has the burden of showing the truth of his allegation.² Loose declarations of the intestate are not enough to change a debt to an advancement or gift.³ And where the deed from a parent to a child recites only a nominal consideration, or one totally inadequate as a fair price for the land; or where it is shown that the parent purchased the land and had it conveyed to the son—then the presumption that the transaction was an advancement “is not to be frittered away by mere refinements.”⁴ No particular words are necessary, so the intestate's intention is clearly made to appear;⁵ but vague and unsatisfactory proof is not enough to turn what the law regards as a

¹ *Piper v. Barse*, 2 Redf. 19; *Middleton v. Middleton*, 31 Ia. 151; *Clements v. Hood*, 57 Ala. 459; *Burton v. Baldwin*, 61 Ia. 283; *Jones v. Kinnear*, 4 R. & G. (Nov. Sco.) 1.

² *Middleton v. Middleton*, *supra*; *Clements v. Hood*, *supra*; *Piper v. Barse*, *supra*.

³ *Harley v. Harley*, 57 Md. 340; *Haverstock v. Sarback*, 1 W. & S. 390; *Porter v. Allen*, 3 Pa. St. 390; *Yundt's Appeal*, 13 Pa. St. 575; *High's Appeal*, 21 Pa. St. 283; *Roland v. Schrack*, 29 Pa. St. 125; *Miller's Appeal*, 40 Pa. St. 57; *Dutch's Appeal*, 57 Pa. St. 461; *Arnold v. Barrow*, 2 P. & H. (Va.) 1; *McDearman v. Hodnett*, 83 Va. 281; *Storey's Appeal*, 83 Pa. St. 89; *Trimmer v. Bayne*, 7 Ves. 508; *Robinson v. Whitley*, 9 Ves. 577; *Powys v. Mansfield*, 3 Mylne & Cr. 359.

⁴ *Finch v. Finch*, 15 Ves. 43; *Jeans v. Cooke*, 24 Beav. 513; S. C. 4 Jur. N. S. 57; 27 L. J. Ch. 202; *Fox v. Fox*, 15 Ir. Ch., p. 95; *Johnson v. Patterson*, 13 Lea, 626.

⁵ *Bulkeley v. Noble*, 2 Pick. 337; *Batton v. Allen*, 1 Halst. Ch. 99.

gift into an advancement.¹ Whether or not there has been an advancement or gift is a question for the jury² unless the facts are uncontroverted, when it is for the court;³ but, of course, if different conclusions may be drawn from the facts as to the intestate's intention, then the question is one for the jury.

¹ *White v. Moore*, 23 S. C. 456.

² *Datt's Estate*, 34 Pitts. L. Jr. 349.

³ *Yeich's Appeal*, 1 Mona. (Pa.) 296.

CHAPTER XXII.

HOTCHPOT.

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| 603. Doctrine of Hotchpot. | 612. Value of Imperfect Gift which is Perfected at Later Date. |
| 604. For what Property Heir Must Account. | 613. Value Fixed by Will. |
| 605. Application to Wife or Widow of Deceased Donor. | 614. Charging Donee with Interest on Property Advanced. |
| 606. Doctrine Applicable to All Distributees. | 615. Rents and Profits—Increased Value. |
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| 610. Refusal to Come in First Distribution Does Not Bar Right to Come and Share Second Distribution. | 619. Statute of Limitations. |
| 611. Estimating Value of Advancement—Time of. | 620. Not a Part of Assets of Estate. |
| | 621. How Question of Advancement Litigated—Partition. |
| | 622. Competency of Advanced Distributee to be a Witness. |

603. DOCTRINE OF HOTCHPOT.—Strictly speaking, the term “hotchpot” is not applicable to a case of settling an intestate’s estate with reference to the requirement that advanced distributees shall bring in and account for advancements made them by the intestate in his lifetime; but various statutes have the term incorporated in their provisions, and the doctrine of one rather obscure term has been applied to the distribution of the estates of intestates, and even to instances of partial intestacy. The best description of the term can be drawn from Littleton’s own words. “If a man seized of certain lands in *fee*

simple," says he, "has issue two daughters, and the eldest is married, and the father giveth part of his lands to the husband with his daughter in *frank-marriage*, and dieth seized of the remnant, the which remnant is of a greater yearly value than the lands given in *frank-marriage*. In this case neither the husband nor wife shall have anything for their purparty of the said remnant, unless they will put their lands given in *frank-marriage* in hotchpot, with the remnant of the land, with her sister. And if they will not do so, then the youngest may hold and occupy the same remnant, and take the profits only to herself. And it seemeth that this word [hotchpot] is in English a *pudding*; for in this pudding is not commonly put one thing alone, but one thing with other things together. And therefore it behooveth in this case to put the lands given in *frank-marriage* with the other lands in hotchpot (that is, to estimate their value in the division), if the husband and wife will have any part in other lands."¹ Blackstone says, in commenting upon the use of the word "hotchpot," "By this housewifely metaphor our ancestors meant to inform us that the lands, both those given in *frank-marriage* and those descending in fee simple, should be mixed and blended together, and then divided in equal portions among all the daughters. But this was left to the choice of the donee in *frank-marriage*: and if she did not choose to put her lands into hotchpot, she was presumed to be sufficiently provided for, and the rest of the inheritance was divided among her other

¹ Thomas' Coke, 720; Coke Litt. 176. The entire chapter of Coke on Littleton from 176 (sect. 265 to 180 a (sect. 276) is very interesting for its meaning in the old law, and this is especially so of Butler and Hargrave's notes. "Hutspot or hotspot is an old Saxon word," says Coke, "and signifieth so much as Littleton here speaks. And the French use hotchpot for a commixion of divers things together. It signifieth here metaphorically *in partem positio*. In English we use to say hodgepodge, in Latin farago or miscellaneum."—Coke Litt. 177 a.

sisters. The law of hotchpot took place then only when the other lands descending from the ancestor were fee simple; for if they descended in tail, the donee in frank-marriage was entitled to her share, without bringing her lands into hotchpot. And the reason is, because lands descending in fee simple are distributed, by the policy of law, for the maintenance of all the daughters; and if one has sufficient provision out of the same inheritance, equal to the rest, it is not reasonable that she should have more; but lands descending in tail are not distributed by the operation of law, but by the designation of the giver, *per fornam doni*; it matters not therefore how unequally this distribution may be. Also no lands, but such as are given in frank-marriage, shall be brought into hotchpot; for no others are looked upon in law as given for the advancement of the women, or by way of marriage portion. And, therefore, as gifts in frank-marriage are fallen into disuse, I should hardly have mentioned the law of hotchpot, had not this method of division been revised and copied by the statute for distribution of personal estates.”¹

604. FOR WHAT PROPERTY HEIR MUST ACCOUNT.—It has already been discussed as to what property may constitute an advancement. The English statute related only to advancements in personal property; but statutes in this country usually apply the doctrine of advancements both to real and personal property.²

¹ 2 Black. Com. 190, 191. The historical side of hotchpot is discussed in the following cases: *Warfield v. Warfield*, 5 H. & J. 459; *Terry v. Davton*, 31 Barb. 519; *Law v. Smith*, 2 R. I. 244; *Hall v. Davis*, 3 Pick. 450; *Marshall v. Rench*, 3 Del. Ch. 254.

In *McCaw v. Blewit*, 2 McC. Ch. 90, it is said that by the use of the term hotchpot in the Statute of Distributions was meant that each child is to draw at the death of the parent an equal proportion.

² *Hamer v. Hamer*, 4 Strobb. Eq. 124.

A devisee under a will, if there is a partial intestacy, is not compelled to bring

605. APPLICATION TO WIFE OR WIDOW OF DECEASED DONOR.—The duty of an advanced distributee to account for gifts by way of advancement does not apply to the wife or widow of the deceased donor¹ unless the statute in express words require it.² Consequently the fact that she has received property from her husband under such circumstances that it would be an advancement if she were his child does not affect or reduce the amount she would be entitled to if she had not received such property,³ unless the statute in words is made applicable to her. And since she cannot be compelled to account for property she has received, neither can she compel her husband's heirs to account for property they have received as advancements in order to increase her share of the estate; and if an heir at the instance of a co-heir is compelled to bring in property he has received by way of advancement, her share, although her husband has not given her any property, cannot be thereby augmented.⁴

into hotchpot the property taken under the will, unless the will especially directed that he shall be charged therewith in the final distribution: *Cawfield v. Brown*, 45 Ala. 552; *Nettleton v. Nettleton*, 17 Conn. 542; *Biedler v. Biedler*, 87 Va. 300.

¹ *Barnes v. Allen*, 25 Ind. 222; *Miller's Will*, 73 Ia. 118; *Ruch v. Biery*, 110 Ind. 444; *Willetts v. Willetts*, 19 Ind. 22; *Porter v. Collins*, 7 Conn. 1; *Richards v. Richards*, 11 Humph. 428; *McDearman v. Hodnett*, 83 Va. 281; *Jackson v. Jackson*, 28 Miss. 674; *Whitley v. Stephenson*, 38 Miss. 113; *Morgan, In re*, 104 N. Y. 74; *Knight v. Oliver*, 12 Gratt. 33; *Miller's Estate*, 2 Brewster (Pa.), 355; *Greiner's Appeal*, 103 Pa. St. 89; *Murray's Estate*, 2 Pears. (Pa.) 473.

² *Davis v. Duke*, 1 Taylor (N. C.), 213 (102); *S. C. Conf. Rep.* 361 (439); *Littleton v. Littleton*, 1 D. & B. 327; *Headen v. Headen*, 7 Ired. Eq. 159.

³ *Jackson v. Jackson*, 28 Miss. 674; *Whitley v. Stephenson*, 38 Miss. 113.

⁴ *Miller's Estate*, 2 Brewster (Pa.), 355; *Knight v. Oliver*, 12 Gratt. 33; *McDearman v. Hodnett*, 83 Va. 281; *Brunson v. Brunson*, Meigs, 630; *Richards v. Richards*, 11 Humph. 428; *Porter v. Collins*, 7 Conn. 1; *Murray's Estate*, 2 Pears. (Pa.) 473; *Logan v. Logan*, 13 Ala. 653; *Andrews v. Hall*, 15 Ala. 85; *Ruch v. Biery*, 110 Ind. 444; *Willetts v. Willetts*, 19 Ind. 22. She simply takes a share of what her husband possessed at his death: *Miller's Will*, 73 Ia. 118. Of course a statute may put her on the same footing with her children: *Boyd v. White*, 32 Ga. 530; *Headen v. Headen*, 7 Ired. Eq. 159.

Where it appeared that the father had delivered to his daughter—a married

606. DOCTRINE APPLICABLE TO ALL DISTRIBUTEES.—With the exception of the wife or widow of the intestate, and sometimes she is included, as we have seen in the previous section, the doctrine is applicable to all the distributees of the estate, to all the heirs of the intestate; to the eldest son,¹ and to an infant,² or imbecile child.³

607. DISTRIBUTE NOT COMPELLED TO BRING ADVANCED PROPERTY INTO HOTCHPOT—OVER-ADVANCED—INFANT.—The law does not compel an advanced distributee to bring his property into hotchpot; it is entirely optional with him, the only penalty inflicted upon him for declining to account for the advanced property is to prohibit his participation in the distribution of the intestate's assets; if, therefore, an heir has been advanced more than he would receive if the amount of the advanced property were added to the property of the intestate, he may decline to bring his property into hotchpot and refuse to refund the excess, and there is no power to compel him to account for it.⁴ But if an ad-

woman—property of the value of \$1,070, and took her bond payable on demand for \$670, but made no charge against her upon his books of an advancement; it was held that the difference between the value of the property and the bond was not intended as an advancement, but a gift, and that, although the payment of the bond could not be enforced, the obligor was not entitled to participate in the distribution of her father's estate until she paid it or submitted to have it charged against her: *Walker v. Brooks*, 99 N. C. 207.

¹ *Doe v. Saunders*, 2 Kerr (N. B.), 18; *Kircudbright v. Kircudbright*, 8 Ves. 51; *Pratt v. Pratt*, Fitzg. 284; S. C. 2 Stra. 935.

² *Powell v. Powell*, 5 Dana, 168. But see *Wilson v. Wilson*, 18 Ala. 176.

³ *Eastham v. Powell*, 51 Ark. 530.

⁴ *Marston v. Lord*, 65 N. H. 4; *Phillips v. McLaughlin*, 26 Miss. 592; *Kennedy v. Badgett*, 26 S. C. 591; *Wilk v. Greer*, 14 Ala. 437; *Coleman v. Smith*, 55 Ala. 368; *Thompson v. Thompson*, 1 Yerg. 97; *Hamer v. Hamer*, 4 Strobb. Eq. 124; *Taylor v. Reese*, 4 Ala. 121.

A child born after a will is executed cannot recover from brothers or sisters advanced before its execution: *Sanford v. Sanford*, 61 Barb. 293.

A creditor of the advanced distributee is bound by his refusal to bring the advanced property into hotchpot: *Stone v. Halley*, 1 Dana, 197.

vanced distributee desires to participate in the assets of the estate of his donor he must first bring into hotchpot the value of the property he received,¹ or at least consent that it may be considered in making the division.² If all the heirs have been equally advanced, then it is not necessary to bring it into hotchpot;³ but if a part of the property received was a gift and part an advancement, then the part that was an advancement must be accounted for.⁴ When the advanced distributee is an infant, and consequently incapable to consent that the property advanced shall be brought in, then the court will act for him, and if it be to his interest that the property be brought in, the court will so order, but if not, the court will not so order.⁵ The refusal of an advanced adult distributee to bring in the amount of property he has received

¹ *Marston v. Lord*, 65 N. H. 4; *Sturdevant v. Goodrich*, 3 Yerg. 95; *Pearce v. Gleaves*, 10 Yerg. 360; *Gold v. Vaughn*, 4 Sneed, 245; *Perry v. High*, 3 Head, 349; *Vance v. Huling*, 2 Yerg. 135; *Farnsworth v. Dinsmore*, 2 Swan, 38; *Walker v. Brooks*, 99 N. C. 207; *Sherwood v. Wooster*, 11 Paige, 441; *Hawley v. James*, 5 Paige Ch. 318; *Ray v. Loper*, 65 Mo. 470; *St. Vrain, In re*, 1 Mo. App. 294; *Grattan v. Grattan*, 18 Ill. 167; *Haden v. Haden*, 7 J. J. Mar. 168; *Neison v. Bush*, 9 Dana, 104; *Sims v. Sims*, 39 Ga. 108; *Mitchell v. Mitchell*, 8 Ala. 414; *Wilson v. Wilson*, 18 Ala. 176.

² In some of the States no provision is made for bringing in the amount of the property advanced, but the advanced distributee is simply charged with the amount advanced, whether he will have it so or not. In other words, the amount of his advancement, when it is ascertained, is added to the total of the assets of the estate of the intestate, the whole sum divided by the number of distributees (after the widow's portion is deducted, if there be one), and from the share due the advanced distributee the amount of his advancement is deducted, and he is paid the remainder, if there be any. Thus he is forced to bring into hotchpot the property he has received from his ancestor.

³ *Cole v. Leake*, 27 Miss. 767.

⁴ *Walker v. Brooks*, 99 N. C. 207.

⁵ *Powell v. Powell*, 5 Dana, 168; *Grattan v. Grattan*, 18 Ill. 167. In *Andrew v. Hall*, 15 Ala. 85, 90, it was held that an infant's *guardian ad litem* could, with the consent of the court, bring in his property. A judgment of distribution against a minor is erroneous without the appointment of a *guardian ad litem*: *Wilson v. Wilson*, 18 Ala. 176, overruling *Parks v. Stonum*, 8 Ala. 752, and *Taylor v. Reese*, 4 Ala. 121.

is a relinquishment and bar of all claims of interest as a distributee of his donor's estate.¹ The relinquishment must be made within a reasonable time after the death of the donor.²

608. KIND OF PROPERTY TO BE BOUGHT IN—VALUE.—It would be preposterous to require the donee to bring in the original property he had received by way of advancement, or even property in specie; therefore he is only required to bring in the value of the property he received from the donor.³

609. AGREEMENT OF DISTRIBUTEE WITH OTHER DISTRIBUTEES TO ACCOUNT FOR PROPERTY ADVANCED.—An advanced distributee may bind himself to account for property advanced him by agreeing with his co-distributees or the administrator that it may be so treated. Thus where it was found that the personal estate was insufficient to pay debts; and the elder children, having been advanced in money and goods, agreed with the administrator in writing, to account for the advancement made to them, to save the real estate from being sold for the payment of debts, and to do justice to the younger children who had received nothing from their father, the agreement was deemed equitable and enforced.⁴ In another instance the father advanced four of his children \$1,200, leaving his four remaining children unadvanced. The children advanced were his sureties, and he was otherwise indebted to them. In order to pay his debts and save his sureties from loss, he conveyed all his property in trust, these

¹ *Taylor v. Reese*, 4 Ala. 121. See *Powell v. Powell*, 5 Dana, 168.

² *Grattan v. Grattan*, 18 Ill. 167. In Louisiana refunding the amount of the advancement seems to be compulsory: *Davis v. Davis*, 5 La. Ann. 561; *O'Neal v. Oates*, 8 La. Ann. 78; *Succession of Cucullu*, 9 La. Ann. 96.

³ *Ray v. Loper*, 65 Mo. 470; *Grattan v. Grattan*, 18 Ill. 167.

⁴ *Smith v. Axtell, Saxt.* (N. J.) 494.

sureties at the time covenanting with the other four children that if the property was insufficient to pay the debts of their father, and also to make them equal with themselves, they would apportion the advancements they had received so as to make all the children of the father equal. It was held that they were bound by the agreement, the property remaining at the close of the trust not being sufficient to make the non-advanced children equal with those advanced.¹

610. REFUSAL TO COME IN FIRST DISTRIBUTION DOES NOT BAR RIGHT TO COME IN AND SHARE SECOND DISTRIBUTION.—A refusal of an advanced distributee to bring his share into hotchpot on the first division does not bar him from bringing it on a second or other division and sharing in such distribution where the property on the second distribution is the land of the intestate freed from the widow's dower by her death. Thus after a widow's dower had been assigned her, one of the heirs refused to bring in his share on a division of the other two-thirds; but after her death, upon a division of the third of the land she had held a life estate in, he was permitted to bring in his advanced property and to share in the property divided on the second division.²

611. ESTIMATING VALUE OF ADVANCEMENT, TIME OF.—Shall the advanced distributee be charged with the

¹ *Bason v. Harden*, 72 N. C. 281. If a party concur in the distribution, neither he nor his heirs can afterward claim that there was an improper division because of an improper reckoning of advancements: *Haden v. Haden*, 7 J. J. Mar. 168; *Nelson v. Bush*, 9 Dana. 104.

² *Persinger v. Simmons*, 25 Gratt. 238. In this case the attempt of the court on the first distribution to bar the children refusing to come in from any further claim was held not to accomplish that object. To same effect *Knight v. Oliver*, 12 Gratt. 33.

For an instance where the amount of the advancement, as found by the court on the first distribution did not bar it in a second distribution, see *French v. French*, 46 Vt. 357.

property advanced at its value when advanced, or when the intestate dies, or when the final distribution of the estate is made? These questions are usually answered by the statutes which provided that the advanced distributee shall be charged with the value of the property as of the date of its advancement. This is eminently proper; for the property, especially if personalty, might be of little value at the death of the intestate or at the time of the final distribution; and it would be manifestly unfair to the other distributees that the advanced distributee might have the use of property for many years, and then be required to account only for its value less the decrease in value from wear and tear and usage. Such is the equitable rule, also, aside from any statute.¹ The object

¹ *Wilks v. Greer*, 14 Ala. 437; *Turner v. Kelly*, 67 Ala. 173; *Barber v. Taylor*, 9 Dana, 84; *Hook v. Hook*, 13 B. Mon. 526; *Stevenson v. Martin*, 11 Bush, 485; *Boweles v. Winchester*, 13 Bush, 1; *Pigg v. Carroll*, 89 Ill. 205; *Clark v. Willson*, 27 Md. 693; *Ray v. Loper*, 65 Mo. 470; *Dixon v. Marston*, 64 N. H. 433; *King v. Worsley*, 2 Hay, 366 (559); *Lamb v. Carroll*, 6 Ired. L. 4; *Raiford v. Raiford*, 6 Ired. Eq. 490; *Wills v. Cowper*, 2 Ohio, 124; *House v. Woodward*, 5 Coldw. 196; *Oyster v. Oyster*, 1 S. & R. 422; *Phillips v. Greeg*, 10 Watts, 158; *Berthelot v. Fitch (La.)*, 10 So. Rep. 867; *Kyle v. Conrad*, 25 W. Va. 760; *Knight v. Yarrowborough*, 4 Rand. 566; *Chinn v. Murray*, 4 Gratt., p. 379; *Scoby v. Sweatt*, 28 Tex. 713; *Law v. Smith*, 2 R. I. 244; *Hudson v. Hudson*, 3 Rand. 117; *Osgood v. Breed*, 17 Mass. 356; *Moore v. Burrow*, 89 Tenn. 101; *Haynes v. Jones*, 2 Head, 373; *O'Neal v. Breechen*, 5 Baxt. 604; *Beckwith v. Butler*, 1 Wash. (Va.) 224.

In South Carolina, by the express terms of the statute, the value of the advanced portion must be estimated as of the date of the death of the ancestor, improvements made by the donee being excluded: *M'Caw v. Blewit*, 2 M'C. Ch. 90; *Ison v. Ison*, 5 Rich. Eq. 15; *McDougald v. King*, Bail. Ch. 154; *Hughey v. Eichelberger*, 11 S. C. 36.

In New Hampshire the value is estimated as of the death of the intestate. Thus one of two heirs was advanced \$9,000. After paying the widow and debts there was left \$9,689.64 for distribution. The intestate died May 13, 1883, and the estate was ready for distribution December 14, 1886. The court decreed that the amount due the unadvanced heir was to be estimated as of the death of the intestate; that is, that he was to receive a sum December 14, 1886, which would be worth, discounted at six per cent., May 13, 1883, \$9,000. This for the reason that the advanced heir had had the income of his \$9,000, while the unadvanced heir had not; and the two should be put on as near an equal footing as possible: *Dixon v. Marston*, 64 N. H. 433.

of a donor in advancing a child is that the donee may enjoy the property advanced during the lifetime of the donor; therefore, where a statute declared that the advancement should be valued as of the date when made; and the advancement consisted of an estate to take effect in the future, it was estimated according to its value when completed by enjoyment thereof by the donee.¹ So where a father insured his life in favor of his daughter and regularly paid the premiums, it was held that its value must be estimated at the time of the father's death, relation being had to its situation at the time the policy was issued. It was also held that the subsequent annual payments of premiums were to be charged without interest as an advancement of such money.²

612. VALUE OF IMPERFECT GIFT WHICH IS PERFECTED AT LATER DATE.—If the gift by way of advancement is so imperfect that no title passes at the time, but by some subsequent act of the donor the gift is made complete, then the ad-

In Georgia the value affixed in a memorandum of advancements kept by the donor, is, *prima facie*, by statute, the value of the property advanced: *Sims v. Sims*, 39 Ga. 108.

¹ *Hook v. Hook*, 13 B. Mon. 526; *Ford v. Ellingwood*, 3 Met. 359; *Clark v. Willson*, 27 Md. 693. (The estate was "the value thereof at the time such advancement was received"). For a lengthy discussion of the question see *Chinn v. Murray*, 4 Gratt. 348, though the point is not decided. When donee only gets life estate with remainder over to his children, see *Brown v. Dortch*, 12 Heisk. 740.

² *Rickenbacker v. Zimmerman*, 10 S. C. 110. Where a father made a deed of slaves to his child, reserving a life estate to himself, the value was estimated at date of his death, the statute providing that the value of an advancement should be estimated "at the time it was delivered:" *Wilks v. Greer*, 14 Ala. 437. Where the gift was a slave, and the donee, an infant, resided with his father until of age, and then left, taking the slave, the value was estimated as of the date of his arriving at full age: *Meadows v. Meadows*, 11 Ired. L. 148; *Adams v. Hayes*, 2 Ired. L. 361.

If there are two distributions of the estate, one by will and the other by the law, and the donor place a value on the advancement, the donee is estopped to controvert the value so far as he claims under the will: *Hook v. Hook*, 13 B. Mon. 526.

vancement is estimated as of the date that the gift is perfected. Such was held the case where a parol gift of land was held void, but which was subsequently perfected by the execution of a deed.¹ Where the gift of land was void, but the son having sold it, the father made the deed, and the son received the purchase-money, the son was charged with the amount of money he received.² Yet when the son took possession and enjoyed the premises and profits thereof, and a deed was executed by the donor to him after the date of his taking possession, the value was estimated as of the date he took possession; and this is undoubtedly a fair rule.³

613. *VALUE FIXED BY WILL.*—If the donor in his will fixes a value on the property advanced, then the value thus fixed must control, especially if it appears from the will that the testator was attempting to make a fair division of his property.⁴ If the will refers to memorandum or an account of the testator showing what property the donee has been advanced, and such memorandum or account shows the value fixed upon it by the testator, then the value as thus fixed must control in determining the value of the advancement made the donee; but if the property thus advanced was worthless at the time of the advancement, it would seem that the donee may show that fact, and if such clearly appears to be the case, he will not be charged with the value thus fixed, upon the ground

¹ *Moore v. Burrow*, 89 Tenn. 101; *Shiver v. Brock*, 2 Jones' Eq. 137; *Haynes v. Jones*, 2 Head, 371; *Hughey v. Eichelberger*, 11 S. C. 36; *O'Neal v. Breecheen*, 5 Baxt. 604. The same is true of personal property: *Meadows v. Meadows*, 11 Ired. L. 148; *Adams v. Hayes*, 2 Ired. L. 361; *Paryear v. Cabell*, 24 Gratt. 260.

² *Barber v. Taylor*, 9 Dana, 84; see *Hook v. Hook*, 13 B. Mon. 526; *Stevenson v. Martin*, 11 Bush, 485; *Bowles v. Winchester*, 13 Bush, 1.

³ *Pigg v. Carroll*, 89 Ill. 206.

⁴ *Nelson v. Nelson*, 7 B. Mon. 672; *Hook v. Hook*, 13 B. M. n. 526; *Grigsby v. Wilkinson*, 9 Bush, 91.

that the donor was relying upon a thing not in existence, and would not so charged the donee if he had known the actual facts concerning the supposed property attempted to be thus charged to him.¹

614. CHARGING DONEE WITH INTEREST ON PROPERTY ADVANCED.—Interest cannot be charged the donee before the donor's death on the property advanced; and this rule is manifestly fair; for no one would care to take the property for the uncertain length of time of the donor's life, and be chargeable in the final distribution of his estate with interest from the time of the reception of such property until the final distribution thereof. Especially would this be true if the property was non-productive.² Interest on a debt due from the donee to the donor, and which by will is turned into an advancement, will not be charged.³ But interest is charged on the value of the

¹ *Marsh v. Gilbert*, 2 Redf. 465. It cannot be said that this case is an authority for all that is stated in the text, but reason and common sense seems to be with the statements in the text. The statement in the text is supported by the language of the court in *Nelson v. Nelson*, 7 B. Mon. 672.

If the will treats a debt as part of the assets of the estate, the heir owing it cannot repudiate the debt and claim the legacy given him: *Williams v. Williams*, 15 Lea, 438; *Cannon v. Apperson*, 14 Lea, 553.

² *Fowler v. Roundtree*, 10 Fla. 299; *Harris v. Allen*, 18 Ga. 177; *Boyd v. White*, 32 Ga. 530; *Manning v. Thurston*, 59 Md. 218; *Osgood v. Breed*, 17 Mass. 356; *Hall v. Davis*, 3 Pick. 450; *Black v. Whitall*, 1 Stock. (N. J.) 573; *Wanmaker v. Van Buskirk*, Sax. (N. J.) 635; *Patterson's Appeal*, 128 Pa. St. 269; *Hudson v. Hudson*, 3 Rand. 117; *Whelen's Appeal*, 70 Pa. St. 410.

³ *Patterson's Appeal*, 128 Pa. St. 269; *Green v. Howell*, 6 W. & S. 203; *Krebs v. Krebs*, 35 Ala. 293. Even though the debt is due from the son-in-law, and the amount due is taken as an advancement to the daughter, no interest is chargeable: *Grim's Appeal*, 105 Pa. St. 375; *Green v. Howell*, 6 W. & S. 203. The testator may direct in his will that an advancement is to draw interest, and indicate from what date it shall begin to run: *Patterson's Estate*, 6 Pa. C. C. 443; *S. C. 45 Lea*. Int. 474; *Treadwell v. Cordis*, 5 Grey, 341. Where a testator in his will dated 1852, forgave all his children all advancements, loans and debts due from any of them "except the capital in the hands of my son Daniel since he entered into his present business of broker, which is to be regarded by my executors as part of my estate;" and in 1854 took from his son Daniel a bond for \$52,488, being

advancements from the date of the intestate's death.¹
In a few States interest does not begin to run until

the amount with interest of various sums of money he received from his father from time to time, and used in his business; and by a codicil, dated in 1857, republished and ratified his will; it was held that the word "capital" was not equivalent to "debt;" that his son could not be charged with the amount of the bond and interest; that his liability to the estate was to be measured by the amount lent to him by the testator as capital in his business, and that this sum should be added as part of the estate as of the time of the testator's death, without interest: *Hutchinson's Appeal*, 47 Pa. St. 84; see *Wilkins v. Wilkins*, 43 N. J. Eq. 595.

In order to equalize the distribution of estates under a will, interest may be charged on advancements, if necessary to secure an equal distribution: *Nichols v. Coffin*, 4 Allen, 27; *Monks v. Monks*, 7 Allen, 401; *Cummings v. Bramhall*, 120 Mass. 552; *Wilkins v. Wilkins*, 43 N. J. Eq. 595.

A testator directed his executors "to ascertain how much has been advanced by me to each and every of my children, and how much each of them may be indebted to me on bond, note, book-account, or otherwise, and to so divide the residue of my property among my said children as that each may have an equal share of my estate—that is, that the moneys so advanced to any of my children, and for which they shall be indebted to me as aforesaid, be counted as so much paid on account of the share of such child in my estate." The testator at his death held notes of each of his sons, a book-account against one, and a bond and warrant of his son-in-law never entered up. On one of the notes he had received a year's interest eight years before the date of the will; on the others no interest was ever paid. It was held that the will converted the notes, bonds, and book-account from debts into advancements, and that no interest was chargeable on them: *Green v. Howell*, 6 W. & S. 203.

Advancements made by trustees, pursuant to the terms of a will, are not chargeable with interest unless the will so directs: *Hosmer v. Sturges*, 31 Ohio St. 657.

¹ *McDougald v. King*, Bail. Ch. 154; *Youngblood v. Norton*, 1 Strobb. Eq. 122; *Glenn, Ex parte*, 20 S. C. 64; *Kyle v. Conrad*, 25 W. Va. 760; *Moore v. Burrow*, 89 Tenn. 101; *Roberson v. Nail*, 85 Tenn. 124; *Williams v. Williams*, 15 Lea, 438; *Johnson v. Patterson*, 13 Lea, 626, 657; *Steele v. Frierson*, 85 Tenn. 430.

Where a father made advancements to his married daughters, and took from them receipts bearing interest, interest was charged only from the date of his death, on the ground that they were not bound by their contract to account for interest during his life and were chargeable only as the law fixed their liability: *Roberson v. Nail*, 85 Tenn. 124.

In Pennsylvania advancements to all the heirs are settled as of the same time, after the death of the testator; and the heirs last paid are entitled to interest from the time when the other heirs received the balances due them respectively: *Yundt's Appeal*, 13 Pa. St. 575; see *Miller's Appeal*, 31 Pa. St. 337.

In Georgia, at one time, interest was charged only from the time the advancement was brought into hotchpot: *Harris v. Allen*, 18 Ga. 177.

the period within which the administrator has to make a settlement has expired.¹

615. RENTS AND PROFITS—INCREASED VALUE.—The rents and profits are the donee's, and they cannot be charged to him as a part of his advancement;² nor can the accrued value of the estate given be charged him.³

616. IMPROVEMENTS ERECTED BY DONEE.—Improvements erected by the donee on the land given cannot be

¹ *Watson's Estate*, 2 W. N. Cas. 113; S. C. 32 Leg. Int. 404; *Boyd v. White*, 32 Ga. 530; *Thompson's Estate*, 8 W. N. Cas. 16; *Ford's Estate*, 28 Leg. Int. 221; S. C. 11 Phila. 97; *Hanner v. Winburn*, 7 Ired. Eq. 142.

Where a widow under her husband's will advanced all his children, but one of them much less than the others, interest was charged to each legatee on the excess of the advancements made to him from the death of the widow until the division: *Cabell v. Puryear*, 27 Gratt. 902. The same rule was followed in *Barrett v. Morriss*, 33 Gratt. 273.

If an heir bring in his advancement, although unduly advanced, and he will receive nothing back, he is still chargeable with interest from the date of the death of the ancestor: *McDougald v. King*, Bail. Ch. 154.

² *Ison v. Ison*, 5 Rich. Eq. 15; *Kyle v. Conrad*, 25 W. Va. 760; *Williams v. Stonestreet*, 3 Rand. 559. Where a child, at the request of its parent, took possession of land and cultivated it for his own benefit, the court refused to charge him with the rents and profits he had received, for the reason that his possession was precarious, and could not be considered as an advancement toward a permanent advancement in life: *Christian v. Coleman*, 3 Leigh, 30. But where a father permitted a child to rent out his (the father's) land, and to receive the rents and profits, the child was charged with such rents and profits as an advancement: *Williams v. Stonestreet*, 3 Rand. 559. Rents may be charged when by the terms of the will it is necessary to equalize the shares: *Jordan v. Miller*, 47 Ga. 346; *Wakefield v. Gilliland*, 13 Ky. L. Rep. 845. In Louisiana the donee is charged with rent from the time of the opening of the succession, but he is reimbursed for the taxes and insurance he has paid out: *Berthelot v. Fitch*, 10 So. Rep. 867 (La.).

³ *Beckwith v. Butler*, 1 Wash. (Va.) 224 (the slave given had a child, and it was decreed to be the donee's without charge to him as an advancement); *Walton v. Walton*, 7 Ired. Eq. 138 (increase of slave); *Puryear v. Cabell*, 24 Gratt. 260; *McCaw v. Blewit*, 2 McC. Ch. 90 (by statute). Where a life estate was reserved to the donor, the children of the slave, born after the gift, belonged to the donee: *Wilks v. Greer*, 14 Ala. 437; *Burton v. Dickinson*, 3 Yerg. 112.

charged to him in estimating his advancement. It would be manifestly unfair to do so.¹

617. PROPERTY WASTED OR DESTROYED — SLAVES EMANCIPATED.—If the donee waste the property given him, before the donor's death, or it is destroyed, he cannot claim that it shall not be taken into account in the final distribution, even though it be destroyed the next day after title is fully vested in him. Its loss is his and not the donor's nor his co-distributee.² Even though the property is destroyed by operation of law, yet the donee is chargeable with its value as of the date the gift is made. This is well illustrated by an advancement of slaves which were emancipated, before the final distribution of the estate. In such instances the donee is chargeable with their value.³ But if the donor has died after the emancipation of the slave, then it is not to be considered an advancement.⁴

618. EFFECT ON TITLE TO PROPERTY ADVANCED BY BRINGING INTO HOTCHPOT.—By bringing into hotchpot

¹ *Powell v. Powell*, 9 Dana, 12; *M'Caw v. Blewit*, 2 McC. Ch. 90 (by statute). If the donee has received no title to the land given, he will be allowed for the improvements he has put on the land during his occupancy of it: *Ware v. Welsh*, 10 Mart. (La.) 430.

² *Fleming's Appeal*, 5 Phila. 351.

³ *Banks v. Shannonhouse*, Phil. (N. C.) L. 284; *Puryear v. Cabell*, 24 Gratt. 260; *Kelley v. McCallum*, 83 N. C. 563; *McLure v. Steele*, 14 Rich. Eq. 105; *Meyer's Succession*, 11 So. Rep. 532; *West v. Jones*, 85 Va. 616. If the slave was a loan, of course it cannot be charged as an advancement, though the value of its services may be: *Hanner v. Winburn*, 7 Ired. Eq. 142.

⁴ *Hughey v. Eickellberger*, 11 S. C. 36; *Wilson v. Kelly*, 21 S. C. 535; *Ex parte Glenn*, 20 S. C. 64.

Where three heirs were advanced in slaves in 1855, 1859, and 1861, respectively, it was held proper, in allotting slaves in December, 1864, to equalize an heir who had received none, to allot them as of their value in 1861, the subsequent emancipation causing a loss common to all the heirs: *West v. Jones*, 85 Va. 616 (1889).

In Louisiana if the slave was emancipated before the opening of the succession, the donee cannot be charged with its value as an advancement: *Succession of Guillory*, 29 La. Ann. 495.

the property advanced the donee does not relinquish his title to it; but the title still remains in him, and only the value of such property is considered.¹ If the distributee advanced brings the property advanced into hotchpot, and it is then found that he has more property than, by counting his property a part of the assets of the estate, each distributee is entitled to, yet this will not effect his title to the overplus, unless he has executed a conveyance to his co-distributees or delivered to them such possession of the overplus as will render them on an equality with him.²

619. STATUTE OF LIMITATIONS.—The advanced distributee cannot plead the statute of limitations as an excuse for not bringing in the property advanced him, and in this way keep such property and share equally in the remainder of the assets of the intestate's estate.³ And this is true even if the advancement consists of a debt owed by the donee to the donor and which could not be collected because of the statute having run against it.⁴

620. NOT A PART OF ASSETS OF ESTATE.—Property advanced, just like the case of a gift, is not a part of the estate of the intestate; and the administrator is not entitled to the possession of it.⁵

¹ *Jackson v. Jackson*, 23 Miss. 674; *Elliott's Estate*, 98 Mo. 379, 384.

² We know of no case on this point, but the above statement is certainly reasonable. Perhaps, the court in awarding a distribution, in such a circumstance, would award judgment against the over-advanced distributee in favor of the other distributees for the amount severally due each.

³ *Ackerman v. Ackerman*, 24 N. J. Ch. 315; *Marston v. Lord*, 65 N. H. 4; *Hughes's Appeal*, 57 Pa. St. 179.

⁴ *Bird's Estate*, 2 Pars. (Pa.) 168. Where a father purchased land in the name of his infant son, so as to make it an advancement, and then took possession of the land as his own; it was held that the father could not claim title by reason of his adverse claim and possession: *White v. White*, 52 Ark. 188.

⁵ *French v. Davis*, 33 Miss. 167; *Haxton v. McClaren*, 132 Ind. 235.

621. HOW QUESTION OF ADVANCEMENT LITIGATED—PARTITION.—The question of advancement may be litigated upon petition to the probate court having charge of the estate of the intestate.¹ So it may be litigated where one distributee brings suit against another for having received, since the intestate's death, more than his share of the estate. So, too, where the advancement may consist of both real and personal property, modern statutes permit the question of advancement to be raised in a suit for the partition of the real estate of the intestate.² If the advancement of the donee has been of personal property, and there has been a distribution of the personal assets of the estate without such advancement having been taken into consideration, or if there are no assets of the estate, or not enough to equalize the heirs, then the question of advancements must be raised in the action of partition; for the judgment of partition will preclude the unadvanced heirs from afterward raising the question or bringing an action against the advanced heir to call him to an account. The same is true of an action for distribution; if the question of advancement is not raised and litigated, and there is no real estate subject to an action for partition, the unadvanced heirs will be barred from afterward bringing forward the question of advancement.³

¹ *Smith v. Smith*, 21 Ala. 761; *Andrews v. Hall*, 15 Ala. 85; *Wilson v. Wilson*, 18 Ala. 176.

² *Hobart v. Hobart*, 58 Barb. 296; *Green v. Walker*, 99 Mo. 68; *New v. New*, 127 Ind. 576; *Melvin v. Bullard*, 82 N. C. 33; *Foltz v. West*, 103 Ind. 404; *Benoit v. Benoit*, 8 La. 230; *Scott v. Harris*, 127 Ind. 520; *White v. White*, 41 Kan. 556; *Ramsey v. Abrams*, 58 Ia. 512. *Contra*, *Myers v. Warner*, 18 Ohio, 519.

If an heir is indebted to the intestate his indebtedness may be considered as an advancement in an action of partition: *New v. New*, 127 Ind. 576.

³ *Blanchard v. Commonwealth*, 6 Watts, 309; see *Carlisle v. Green*, 19 S. W. Rep. 925, and *Norris v. Norris*, 3 Ind. App. 500.

Usually the case is tried by the court, but often statutes provide for juries: *Gaillard v. Duke*, 57 Ala. 619.

622. COMPETENCY OF ADVANCED DISTRIBUTEES TO BE A WITNESS.—In an action of partition or in a suit for distribution, the donee or advanced heir, under the usual statute concerning the competency of witnesses, is not competent as a witness to prove the declarations of the donor or intestate.¹

If the party bringing a suit for distribution admit in his bill that he has been advanced, he must aver a willingness to bring the advanced property into hotchpot: *Tison v. Tison*, 12 Ga. 208; S. C. 14 Ga. 167.

Where a testator charged his real estate with the payment of his debts, it was held that advancements are not to be considered in fixing the proportion of the debts which each devisee was to pay: *Gaw v. Huffman*, 12 Gratt. 628.

An advancement made to a daughter cannot be offset by a claim held by her husband against her father: *Adair v. Hare*, 73 Tex. 273; *Seagrist's Appeal*, 10 Pa. St. 424.

¹ *Wolfe v. Kable*, 107 Ind. 565; *Dille v. Webb*, 61 Ind. 85; *Comer v. Comer*, 119 Ill. 170, distinguishing *Pigg v. Carroll*, 89 Ill. 205. But *contra*, *Graves v. Spedden*, 46 Md. 527; *Williams v. McDowell*, 54 Ga. 222.

It has been held that the widow of the intestate may testify what her husband told her about certain property being an advancement when such advancement does not affect her distributive share, and no objection is raised that the testimony relates to confidential communications: *Scott v. Harris*, 127 Ind. 520.

If the donee is the executor or administrator, it may be shown that he included the advanced property in his inventory of the assets of the estate; and he may then explain why he did it: *Williams v. McDowell*, 54 Ga. 222.

APPENDIX.

STATUTE OF DISTRIBUTIONS.

AN ACT FOR THE BETTER SETTLEMENT OF INTESTATE'S ESTATES.

Be it enacted by the King's most excellent Majesty, with the advice and consent of the lords spiritual and temporal, and the commons in this present Parliament assembled, and by the authority of the same, That all ordinaries, as well as the judges of the prerogative courts of Canterbury and York for the time being, as all other ordinaries and ecclesiastical judges, and every of them, having power to commit administration of the goods of persons dying intestate, shall and may upon their respective granting and committing of administration of the goods of persons dying intestate, after the first day of June, one thousand six hundred seventy and one, of the respective person or persons to whom any administration is to be committed, take sufficient bonds with two or more able sureties, respect being had to the value of the estate, in the name of the ordinary, with the condition in form and manner following, *mutatis mutandis*, viz. :

II. The condition of this obligation is such, That if the within bounden A B, administrator of all and singular the goods, chattels, and credits of C D, deceased, do make and cause to be made, a true and perfect inventory of all and singular the goods and chattels and credits of the said deceased, which have or shall come to the hands and possession of any other person or persons for him, and the same so made do exhibit or cause to be exhibited into the

registry of court, at or before the day of next ensuing; (2) and the same goods, chattels, and credits, and all other goods, chattels, and credits of the said deceased at the time of his death, which at any time after shall come to the hands or possession of the said A B or into the hands and possession of any other person or persons for him, do well and truly administer according to law; (3) and further do make or cause to be made, a true and just account of his said administration, at or before the day of and all the rest and residue of the said goods, chattels, and credits which shall be found remaining upon the said administrator's account, the same being first examined and allowed of by the judge or judges for the time being of the said court, shall deliver and pay unto such person or persons respectively, as the said judge or judges by his or their decree or sentence, pursuant to the true intent and meaning of this act, shall limit and appoint. (4) And if it shall hereafter appear, That any last will and testament was made by the said deceased, and the executor or executors therein named do exhibit the same into the said court, making request to have it allowed and approved accordingly, if the said A B within bounden, being thereunto required, do render and deliver the said letters of administration (approbation of such testament being first had and made) in the said court; then this obligation to be void and of none effect, or else to remain in full force and virtue.

III. Which bonds are hereby declared and enacted to be good to all intents and purposes, and pleadable in any courts of justice; (2) and also that the said ordinaries and judges respectively, shall and may, and are enabled to proceed and call such administrators to account, for and touching the goods of any person dying intestate;

(3) and upon hearing and due consideration thereof, to order and make just and equal distribution of what remaineth clear (after all debts, funerals, and just expenses of every sort first allowed and deducted) amongst the wife and children, or children's children, if any such be, or otherwise to the next of kindred to the dead person in equal degree, or legally representing their stocks *pro suo cuique, jure*, according to the laws in such cases, and the rules and limitation hereafter set down; and the same distributions to decree and settle, and to compel such administrators to observe and pay the same, by the due course of his Majesty's ecclesiastical laws; (4) saving to every one, supposing him or themselves aggrieved, their right of appeal as was always in such cases used.

IV. *Provided*, That this act, or anything herein contained, shall not always prejudice or hinder the customs observed within the city of London or within the province of York, or other places, having known and received customs peculiar to them, but that the same customs may be observed as formerly; anything herein contained to the contrary notwithstanding.

V. *Provided always*, and be it enacted by the authority aforesaid, that all ordinaries and every other person who by this act is enabled to make distribution of the surplusage of the estate of any person dying intestate, shall distribute the whole surplusage of such estate or estates in manner and form following: that is to say, (2) one-third part of the said surplusage to the wife of the intestate, and all the residue by equal portions, to and amongst the children of such persons dying intestate, and such persons as legally represent such children, in case any of the said children be then dead, other than such child or children (not being heir-at-law) who shall have any estate by the settlement of the intestate, or shall be advanced

by the intestate in his lifetime, by portion or portions equal to the share which shall by such distribution be allotted to the other children to whom such distribution is to be made ; (3) and in case any child, other than the heir-at-law, who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his lifetime by portion not equal to the share which shall be due to the other children by such distribution as aforesaid ; then so much of the surplusage of the estate of such intestate, to be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the lifetime of the intestate, as shall make the estate of all the said children to be equal as near as can be estimated ; (4) but the heir-at-law, notwithstanding any land that he shall have by descent or otherwise from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of the land which he hath by descent, or otherwise from the intestate.

VI. And in case there be no children nor any legal representatives of them, then one moiety of the said estate to be allotted to the wife of the intestate, the residue of the said estate to be distributed equally to every of the next of kindred of the intestate, who are in equal degree and those who legally represent them.

VII. *Provided*, That there be no representations admitted among collaterals after brothers' and sisters' children ; (2) and in case there be no wife then all the said estate to be distributed equally to and amongst the children ; (3) and in case there be no child, then the next of kindred in equal degree of or unto the intestate, and their legal representatives as aforesaid, and in no other manner whatsoever.

VIII. *Provided also*, and be it likewise enacted by the authority aforesaid, To the end that a due regard be had to creditors, that no such distribution of the goods of any person dying intestate be made till after one year be fully expired after the intestate's death; (2) and that such and every one to whom any distribution and share shall be allotted, shall give bond with sufficient sureties in the said courts, that if any debt or debts truly owing to the intestate shall be afterward sued for and recovered, or otherwise duly made to appear; that then and in every such case he or she shall respectively refund and pay back to the administrator his or her ratable part of that debt or debts, and of the costs of suit and charges of the administrator by reason of such debt, out of the part and share so as aforesaid allotted to him or her, thereby to enable the said administrator to pay and satisfy the said debt or debts so discovered after the distribution made as aforesaid.

IX. *Provided always*, and it be enacted by the authority aforesaid, That in all cases where the ordinary hath used, heretofore, to grant administration *cum testamento annexo*, he shall continue so to do, and the will of the deceased in such testament expressed shall be performed and observed in such manner as it should have been if this act had never been made.

X. *Provided also*, That this act shall continue in force for seven years, and from thence to the end of the next session of Parliament and no longer. 29 Car. 2, c. 3, s. 25; 30 Car. 2, stat. 1, c. 6, made perpetual by I Jac. 2, c. 17, s. 5.

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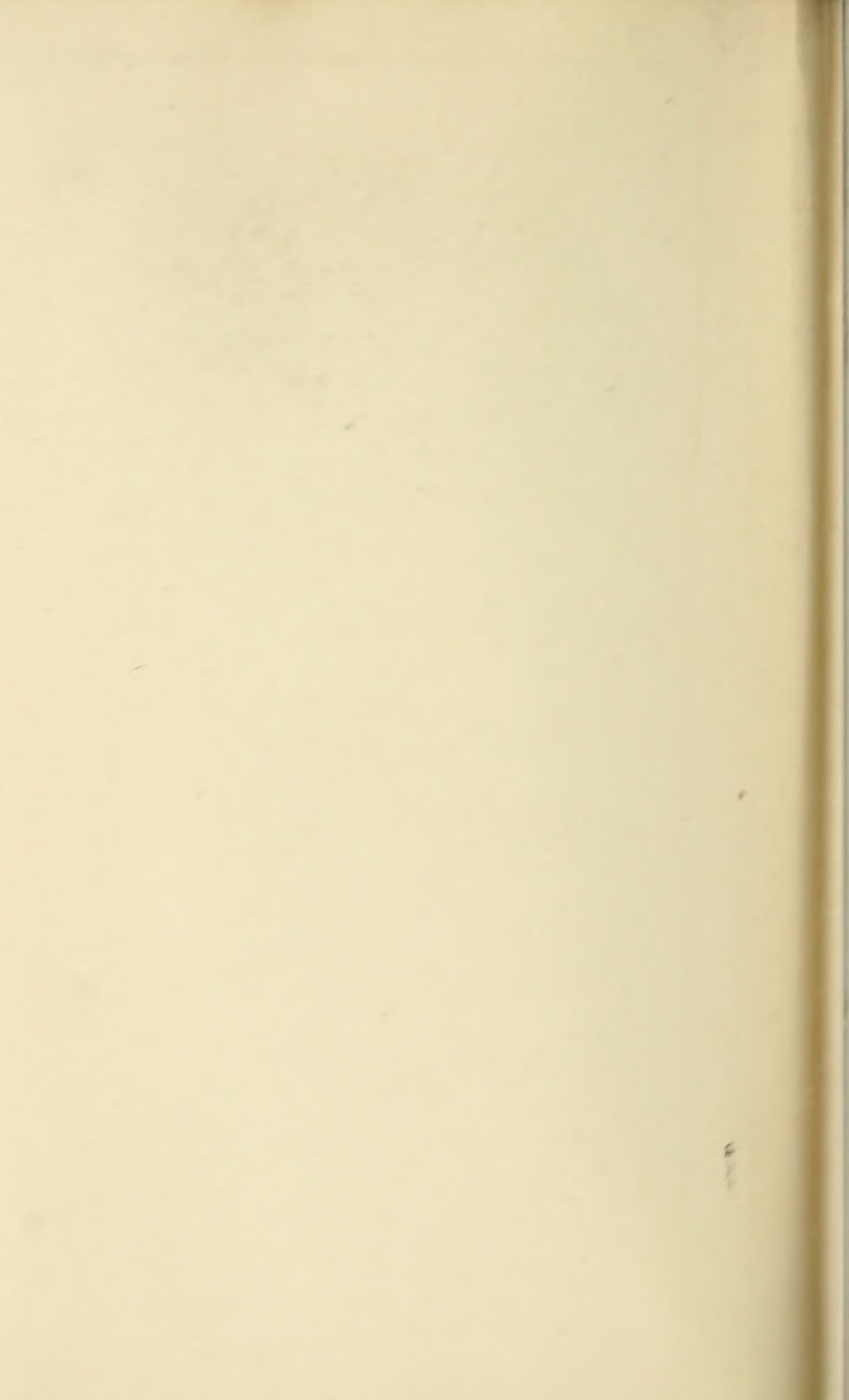
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